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# Peer Harassment--Interference with an Equal Educational Opportunity in Elementary and Secondary Schools

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# Peer Harassment—Interference with an Equal Educational Opportunity in Elementary and Secondary Schools

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## I. INTRODUCTION

When an elementary or secondary school student is harassed at school, the harassment is likely to interfere with the student's education. If such harassment is motivated by the victim's race or gender, it constitutes a form of race or gender discrimination because the victim

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is subjected to different conditions based on race or gender. Because educational institutions may not deprive students of equal educational opportunities based on race or gender, school officials have a duty to address such harassment. This duty becomes more obvious when school officials, such as teachers, are directly involved in the harassment than when fellow students are engaged in the harassing conduct. Peer harassment in schools raises difficult legal issues because fellow students rather than school officials are the problem, at least initially. Thus, the issue is whether schools and their officials can be held liable for the inequality in educational opportunity that results from peer harassment. This article suggests the answer should be yes. A second, less complex issue is whether the students responsible for the harassment, or at least their parents, can be held liable.<sup>1</sup> In addressing these issues, it is necessary to distinguish between public and private schools because some of the relevant laws apply only to government officials and entities.<sup>2</sup>

Accordingly, and to lay the foundation, the well-documented existence of racial and sexual harassment in secondary and elementary schools will be summarized in section II of this article. Prevention of harassment will be discussed in section III, with emphasis on the efficacy of strong policies, accompanying education, and prompt corrective action by school officials to ensure students harassment-free educational opportunities.

Finally, section IV will discuss the potential remedies for the student victims of student harassment in schools. First, victims of such harassment may have claims against the students who actually engaged in the harassment, based on civil rights statutes and common law tort theories. Second, victims may have state law claims that seek to hold parents liable for the actions of their children. In many situations, neither the students nor their parents will be able to satisfy a judgment, so victims will attempt to hold schools and school officials liable. A key to holding schools and their officials liable is a showing that they knew or should have known of the harassment and failed to take prompt, appropriate corrective action. However, as mentioned before, elementary and secondary schools have an affirmative duty to

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1. Because students are less likely than the school corporation, or even school officials, to have the resources to satisfy a substantial judgment, they are less attractive defendants. In some states, parents can be held responsible for the torts of their children, at least up to a certain amount. See, e.g., IND. CODE § 34-31-4-1 (1998).
  2. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution applies only to state and local government actors. Similarly, the civil rights statute pursuant to which the Fourteenth Amendment is enforced, 42 U.S.C. § 1983, requires action under state law. Private schools would generally not satisfy the "state action" requirement. See e.g., *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

provide all children with an equal educational opportunity; that duty includes identifying and removing harassment from all schools, both public and private.

## II. NATURE AND EXTENT OF THE PROBLEM

While the actual extent of racial and sexual harassment in elementary and secondary schools is not clear, reliable information suggests that a problem exists. This is evident from the fact that the U.S. Department of Education (DOE), the federal agency with the responsibility of enforcing two federal statutes that prohibit race and sex discrimination in education, has published a "guidance" addressing each of these two types of harassment. In its 1994 *Racial Harassment Guidance*, the DOE stated, "[t]he existence of racial incidents and harassment on the basis of race, color, or national origin against students is disturbing and of major concern to the Department."<sup>3</sup> A few years later, in its *Sexual Harassment Guidance*, the DOE noted:

The elimination of sexual harassment of students in federally assisted educational programs is a high priority for [the Office of Civil Rights]. Through its enforcement of Title IX, OCR has learned that a significant number of students, both male and female, have experienced sexual harassment, that sexual harassment can interfere with a student's academic performance and emotional and physical well-being, and that preventing and remedying sexual harassment in schools is essential to ensure nondiscriminatory, safe environments in which students can learn.<sup>4</sup>

This represents an official recognition that both racial and sexual harassment are sufficiently prevalent in schools to warrant a specific guidance addressing each form of harassment.

A frequently-cited study, "Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools,"<sup>5</sup> presents the following "Big Picture":

The startling findings on sexual harassment in *The AAUW Report: How Schools Shortchange Girls* compelled the AAUW Educational Foundation to undertake further research. We wanted to assess the extent of sexual harassment in America's schools and, even more important, the effects of that harassment on our children.

AAUW commissioned one of this country's most respected survey research firms, Louis Harris and Associates, to ensure that the survey's methodology, implementation, and questionnaire would meet the highest standards of the survey research community. The survey was designed to provide a profile of

3. Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11,448 (March 10, 1994) [hereinafter *Racial Harassment Guidance*].
4. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties; Notice, 62 Fed. Reg. 12,033, 12,034 (March 13, 1997) [hereinafter *Sexual Harassment Guidance*].
5. American Association of University Women Educational Foundation, *Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools* (1993) [hereinafter *AAUW Survey*].



the problem of sexual harassment in school and answer many of the questions about school-based sexual harassment. In addition to measuring the extent of sexual harassment in school, AAUW was determined to identify the educational, emotional and behavioral impact of sexual harassment on our nation's schoolchildren.

The results of this survey form a bleak picture: 4 out of 5 students have experienced some form of sexual harassment in school. And while the impact of sexual harassment in school is significant for all students, girls suffer greater effects than boys. Further, the level of sexual harassment of boys is surprisingly high.

For many, the analysis that follows will confirm their worst fears about sexual harassment in school; for others, the results will be surprising and shocking.

What will be clear to all is that sexual harassment in America's schools affects—even disables—girls and boys alike.

What remains is the challenge facing students, teachers, and parents to ensure that the behaviors detailed in this survey do not continue.<sup>6</sup>

According to the AAUW survey, most of the harassment occurs in the public areas of school facilities—in the halls, the classrooms, on school grounds, in the cafeteria, or on school transportation.<sup>7</sup> The harassment creates a substantial educational impact, with victims not wanting to go to school, not wanting to talk as much in class, finding it hard to pay attention in school, staying home or cutting classes, making lower grades on tests and in class, and finding it hard to study.<sup>8</sup> Harassment also has an emotional impact, with victims feeling embarrassed, feeling self-conscious, being less sure of themselves or less confident, feeling afraid or scared, doubting whether they can have a happy romantic relationship, and feeling confused about who they are.<sup>9</sup> The AAUW survey also addressed the behavioral impact of harassment.<sup>10</sup> Another important finding in the AAUW survey shows “that students do not routinely report sexual harassment incidents to adults” and “most reporting takes place on a peer-to-peer basis.”<sup>11</sup>

Other evidence, although not gathered as systematically as the AAUW survey, supports the above conclusions. Examples, often outrageous, are found in reported cases,<sup>12</sup> law review articles<sup>13</sup> and

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6. *Id.* at 4.

7. *See id.* at 12-14.

8. *See id.* at 15-16.

9. *See id.* at 16-17.

10. *See id.* at 17-18.

11. *Id.* at 14.

12. *See, e.g.,* Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999); Soper *ex rel.* Soper v. Hoben, 195 F.3d 845 (6th Cir. 1999); Murrell v. School Dist. No. 1, Denver, CO, 186 F.3d 1238 (10th Cir. 1999); Bruneau *ex rel.* Schofield v. South Kortright Cent. Sch. Dist., 163 F.3d 749 (2d Cir. 1998); Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022 (9th Cir. 1998); Morse v. Regents of the Univ. of Colo., 154 F.3d 1124 (10th Cir. 1998); Oona R.-S.- by Kate S. v. McCaffrey, 143 F.3d 473, *opinion amended and reh'g denied*, \_\_\_\_ F.3d \_\_\_\_, 1998 WL 216944 (9th Cir. 1998), *cert. denied* 119 S. Ct. 2039 (1999); Franks v. Kentucky Sch. for

newspaper articles.<sup>14</sup> While some may question whether student-student harassment should result in litigation, the fact that these incidents often end up in court demonstrates that other avenues of relief are not available. Many of the injuries and much of the litigation could be avoided if school officials would treat racial and sexual harassment as a serious matter and address it accordingly. As with many problems, prevention is the best remedy.

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- the Deaf, 142 F.3d 360 (6th Cir. 1998); *Bosley v. Kearney R-1 Sch. Dist.*, 140 F.3d 776 (8th Cir. 1998); *Doe v. University of Ill.*, 138 F.3d 653 (7th Cir. 1998), *cert. granted and opinion vacated* 119 S. Ct. 2016 (1999); *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir. 1996); *Doe v. Petaluma City Sch. Dist.*, 54 F.3d 1447 (9th Cir. 1995); *Doe v. Londonderry Sch. Dist.* 970 F. Supp. 64 (D.N.H. 1997); *Doe v. Covington County Sch. Bd.*, 969 F. Supp. 1264 (N.D. Ala. 1997); *Nicole M. v. Martinez Unified Sch. Dist.*, 964 F. Supp. 1369 (N.D. Cal. 1997); *Collier v. William Penn Sch. Dist.*, 956 F. Supp. 1209 (E.D. Pa. 1997); *Wright v. Mason City Community Sch. Dist.*, 940 F. Supp. 1412 (N.D. Iowa 1996); *Burrow v. Postville Community Sch. Dist.*, 929 F. Supp. 1193 (N.D. Iowa 1996); *Mennone v. Gordon*, 889 F. Supp. 53 (D. Conn. 1995); *Garza v. Galena Park Indep. Sch. Dist.*, 914 F. Supp. 1437 (S.D. Tex. 1994); *Elliott v. New Miami Bd. of Educ.*, 799 F. Supp. 818 (S.D. Ohio 1992).
13. See, e.g., Verna L. Williams & Deborah L. Brake, *When a Kiss Isn't Just a Kiss: Title IX and Student-to-Student Harassment*, 30 CREIGHTON L. REV. 423 (1997); Deborah Austern Colson, *Safe Enough to Learn: Placing an Affirmative Duty of Protection on Public Schools Under 42 U.S.C. Section 1983*, 30 HARV. C.R.-C.L. L. REV. 169 (1995); Helena K. Dolan, *The Fourth R—Respect: Combatting Peer Sexual Harassment in the Public Schools*, 63 FORDHAM L. REV. 215 (1994); Elizabeth J. Gant, *Applying Title VII "Hostile Work Environment" Analysis to Title IX of the Education Amendments of 1972—An Avenue of Relief for Victims of Student-to-Student Sexual Harassment in the Schools*, 98 DICK. L. REV. 489 (1994); Stacey R. Rinehine, *Terrorism on the Playground: What Can Be Done?*, 32 DUQ. L. REV. 799 (1994); Gail Sorenson, *Peer Sexual Harassment: Remedies and Guidelines Under Federal Law*, 92 EDUC. L. REP. 1 (1994); Karen Mellencamp Davis, *Reading, Writing, and Sexual Harassment: Finding a Constitutional Remedy When Schools Fail to Address Peer Abuse*, 69 IND. L.J. 1123 (1994); Carrie N. Baker, *Proposed Title IX Guidelines on Sex-Based Harassment of Students*, 43 EMORY L.J. 271 (1994); Stefanie H. Roth, *Sex Discrimination 101: Developing a Title IX Analysis for Sexual Harassment in Education*, 23 J.L. & EDUC. 459 (1994); Adam Michael Greenfield, *Annie Get Your Gun 'Cause Help Ain't Comin': The Need for Constitutional Protection from Peer Abuse in Public Schools*, 43 DUKE L.J. 588 (1993); Monica L. Sherer, *No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 U. PA. L. REV. 2119 (1993); JoAnn Strauss, *Peer Sexual Harassment of High School Students: A Reasonable Student Standard and an Affirmative Duty Imposed on Educational Institutions*, 10 LAW & INEQ. J. 163 (1992); Jollee Faber, *Expanding Title IX of the Education Amendments of 1972 to Prohibit Student to Student Sexual Harassment*, 2 UCLA WOMEN'S L.J. 85 (1992).
  14. See, e.g., Tamar Lewin, *Students Seeking Damages for Sex Bias*, N.Y. TIMES, July 15, 1994, at B7; Deborah L. Rhode, *You Must Remember This*, NAT'L L.J., October 28, 1996, at A21; Adam Nossiter, *Six-Year-Old's Sex Crime: Innocent Peck on Cheek*, N.Y. TIMES, September 27, 1996, at A9; Judy Mann, *What's Harassment? Ask a Girl*, WASH. POST, June 23, 1993, at D26; Leora Tannenbaum, *Sluts and Suits*, IN THESE TIMES, May 13, 1996, at 33; Jane Gross, *Schools Our Newest Arenas for Sex-Harassment Issues*, N.Y. TIMES, March 11, 1992, at B8.

## III. PREVENTION

Those in the best position to prevent harassment are parents, teachers, and others who are responsible for teaching school-age children about respect. However, schools also have an important role to play because of their obligation to provide an equal educational opportunity. Racial and sexual harassment by students should be addressed as part of a school's code of conduct, just like physical abuse and violence. Such harassment should be taken as seriously as a punch in the face. Most school officials will not tolerate students who strike other students in the face; however, they are often more tolerant of students who harass other students. Part of this is inherent in the nature of harassment because, unlike other types of harm, harassment usually does not leave any evidence, like blood and bruises, of the wrongful act. Therefore, when a student alleges harassment, a dispute often occurs over whether the alleged incident actually happened.

The difference can be demonstrated by comparing two types of cases involving alleged discrimination in employment. Where one employee claims she was discharged because of her race or gender, usually the parties can agree to one fact—that she was discharged—and address whether it was due to race or gender. In contrast, when an employee claims she was racially or sexually harassed in the workplace, the employer frequently denies the occurrence of the alleged harassment. Because frequently no physical manifestations of the harm caused by racial or sexual harassment exist,<sup>15</sup> there is a tendency to discount the allegation and question whether anything inappropriate really happened and, if so, whether real harm occurred.

Mental and emotional injuries are more difficult to detect. Nearly everyone has experienced physical pain, and can identify with it.

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15. At least, there is not an immediate physical reaction, like a bloody nose, that is easily traceable to the blow to the nose. However, this does not mean that harassment does not lead to physical injuries. See, e.g., ROBERT J. SHOOP & JACK W. HAYHOW, JR., SEXUAL HARASSMENT IN OUR SCHOOLS 64-67 (1994); MICHELE A. PALUDI & RICHARD B. BARICKMAN, ACADEMIC AND WORKPLACE SEXUAL HARASSMENT 27-34 (1991); MICHELE A. PALUDI, IVORY POWER: SEXUAL HARASSMENT ON CAMPUS 78-80, 97-98 & 112-13 (1990); Julie S. Lu, *Rowinsky v. Bryan Independent School District: Does Title IX Impose Liability on Schools for Student-to-Student Sexual Harassment?*, 42 VILL. L. REV. 969 (1997); Alexandra A. Bodnar, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN'S STUD. 549, 561 (1996); Jollee Faber, *Expanding Title IX of the Education Amendments of 1972 to Prohibit Student to Student Sexual Harassment*, 2 UCLA WOMEN'S L.J. 85, 97 (1992).

Aside from physical injuries, there is often an immediate psychological reaction. See, e.g., *Murrell v. School Dist. No. 1, Denver, CO*, 186 F.3d 1238, 1244 (10th Cir. 1999) (stating that victim began to engage in self-destructive and suicidal behavior).

However, many people have not experienced discrimination or harassment and have not made an effort to understand the mental, emotional, and physical harm it can cause. This is evident when people suggest that no clear line exists between "teasing" and actionable harassment. Such an attitude can easily lead school officials to question the need for preemptive policies and to be cavalier in their treatment of harassment complaints made by victims.

Nevertheless, school officials have at least three incentives for adopting a meaningful policy prohibiting racial and sexual harassment. First, they should be interested in promoting respect (the fourth R)<sup>16</sup> for fellow students. This can be accomplished through positive steps as well as a policy against behavior that shows a lack of respect. Second, school officials have an affirmative duty to provide an equal educational opportunity by removing any barriers based on race or gender. Third, schools should be interested in avoiding litigation and liability arising out of peer harassment. By analogy to cases involving sexual harassment that creates a hostile work environment,<sup>17</sup> the existence of a policy may be a factor in determining whether the school corporation is liable. The latter possibly provides the most powerful incentive because it more easily and directly translates into financial terms. Whatever the motivation, no school should be without a comprehensive policy related to racial and sexual harassment of students by students, as well as by teachers and other school employees.

Any such policy should appear in a prominent place in the student handbook and address all peer harassment even though certain types of harassment may not lead to legal liability, at least not under civil rights laws.<sup>18</sup> While the policy uses the term "harassment," it could

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16. See Helena K. Dolan, *The Fourth R—Respect: Combatting Peer Sexual Harassment in the Public Schools*, 63 *FORDHAM L. REV.* 215 (1994).

17. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 2268-70 (1998) (citing sexual harassment in employment by supervisors); see also *Farley v. American Cast Iron Pipe Co.*, 115 F.3d 1548, 1554-55 (11th Cir. 1997) (discussing company's liability for harassment by co-workers); *Bonenberger v. Plymouth Transp.*, 132 F.3d 20, 26-27 (3d Cir. 1997) (analyzing liability for harassment by co-workers); *Harris v. L&L Wings, Inc.*, 132 F.3d 978, 982 (4th Cir. 1997) (discussing liability for harassment by co-workers).

18. While any harassment in school can interfere with an education, only those characteristics covered by federal law—i.e. race, national origin, sex, or disability—are actionable under the federal civil rights laws. All forms of harassment may be actionable under state law. Another advantage of addressing all peer harassment in a school policy is that it helps avoid the "underinclusive" argument relied upon by the majority in *R.A.V. v. St. Paul*, 505 U.S. 377 (1992). In that case a St. Paul ordinance regulating "hate speech" was found unconstitutional because it addressed only "fighting words" directed at someone because of their race, color, creed, religion or gender. *St. Paul*, 505 U.S. at 384. Therefore, a more general policy is less susceptible to a First Amendment challenge.



be defined as "interference"<sup>19</sup> because, in the context of education, the real evil of harassment lies in its interference with an equal educational opportunity.

The following represents the basic structure of a policy that, with changes in the language to reflect the ages of the students, may be appropriate for elementary and secondary schools.

It is the policy of the school to promote respect for students, teachers, administrators and staff. Further, it is the goal of the school to provide an environment conducive to learning in which all students have an equal opportunity to learn and develop. Student harassment of other students shows a lack of respect and interferes with the opportunity to learn and develop. Therefore, harassment of other students will not be tolerated and, if proved, will lead to disciplinary action.

In order for school officials to deal with those students who harass other students, it is important that the targets or victims of such harassment report it promptly. Also, students who observe harassment directed at others should report it. If anyone treats you differently because you reported harassment or cooperated in an investigation of harassment, please report the different treatment so we can protect you. Such retaliatory action constitutes a separate violation of the code of conduct and may lead to separate disciplinary action.

Any school employee who observes, or otherwise becomes aware of, harassment of students, must report it promptly to \_\_\_\_\_.

Harassment is defined as any conduct that is sufficiently severe, pervasive or persistent to interfere with or limit the ability of a student to participate in or benefit from school programs, services and activities. Such harassing conduct may be physical, verbal, graphic or written.

If you believe you are a victim of harassment by other students, or have reason to believe another student is being harassed, you should report this to the Office of the Principal, a teacher, a counselor, a school nurse, your parents, or [alternatives, such as designated students]. After you report the information, an investigation will be undertaken promptly and, if there is reason to believe harassment took place, corrective or remedial action will be taken and disciplinary proceedings will be initiated in accordance with § \_\_\_\_.

The person(s) designated to accept charges of harassment should be trained so the victim is not made to feel like the wrongdoer.<sup>20</sup> A

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19. This is based, in part, on a provision in the Fair Housing Act which states: [it is] unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by [other provisions of the Act].

42 U.S.C. § 3617 (1983). Similarly, the Americans with Disabilities Act states: [it is] unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this Act.

42 U.S.C. § 12203(b) (1997).

20. The AAUW Survey, *supra* note 5, at 14, indicates that harassment in school is underreported, at least to school officials. Victims "do not routinely report sexual harassment incidents to adults," and only "7% of sexually harassed students say

referral to the school counselor may be required, depending on how traumatic the incident was to the victim.<sup>21</sup> A determination of whether the reported conduct constitutes harassment should be reserved until the investigation is completed. The worst response by any school official notified of student harassment would be one that suggests the matter is not taken seriously by school officials. This message can be communicated in a number of ways, including the failure to do anything, a suggestion that such behavior is acceptable ("boys will be boys"), a suggestion that the complaining party must have invited the action, or a suggestion that the victim should be able to deal with the conduct.<sup>22</sup> A comparison to the student complaining of a punch in the face is appropriate because it is unlikely a school official will send the message that such physical abuse is not taken seriously.

In adopting policies, taking preventative measures, and imposing discipline for harassment, public schools must be aware of potential First and Fourteenth Amendment issues.<sup>23</sup> Because harassment can

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they have told a teacher about the experience, with girls twice as likely as boys to have done this." *Id.* Students are far more likely to report harassment to a friend, with the study showing that 63% of the victims told a friend. *See id.* A 16-year-old white female is quoted as saying, "I wasn't dressed very provocative and I gave them no reason to harass me. I was upset the administration didn't respond immediately after I complained. I was told to ignore the harassers." *Id.*

In its guidance on sexual harassment, the Office of Civil Rights (OCR) says:

[t]raining for administrators, teachers, and staff and age-appropriate classroom information for students can help to ensure that they understand what types of conduct can cause sexual harassment and that they know how to respond. . . . Finally, the school must make sure that all designated employees have adequate training as to what conduct constitutes sexual harassment and are able to explain how the grievance procedure operates.

*Sexual Harassment Guidance*, *supra* note 4, at 12,044, 12,045 (1997). The OCR found that a college violated Title IX "in part because the person identified by the school as the Title IX coordinator was unfamiliar with Title IX, had no training, and did not even realize he was the coordinator." *Id.* at 12,051 n.91.

21. *See, e.g., Sexual Harassment Guidance*, *supra* note 4, at 12,045 (stating that the victim of harassment cannot be expected to work out the problem directly with the alleged harassers without appropriate involvement by school officials like counselors, trained mediators, teachers, or administrators).
22. After she complained to the Superintendent and Title IX compliance officer, in *Niles v. Nelson*, 72 F. Supp. 2d 13, 15 (N.D.N.Y. 1999), the student-victim was suspended for "making a false report" and the suspension was upheld by the Board of Education. *See also Murrell v. School Dist. No. 1, Denver, CO*, 186 F.3d 1238, 1244 (10th Cir. 1999) (noting that the victim, a developmentally and physically disabled high school student, was suspended by the principal for "[b]ehavior which is detrimental to the welfare, safety, or morals of other pupils or school personnel," after the principal suggested the sexual contact may have been consensual even though the boy admitted assaulting the victim after she resisted his advances).
23. The First Amendment to the U.S. Constitution guarantees freedom of speech and expressive association. While the First Amendment refers only to Congress, it



sometimes qualify as an expression of one's opposition to racial and/or gender equality, efforts to suppress such expression may be challenged as a violation of the right to freedom of speech guaranteed by the First Amendment. While not intended as an exhaustive discussion of the First Amendment issue, the following provides at least an introduction to the arguments.

Much has been written about harassing speech, sometimes referred to as "hate speech."<sup>24</sup> A student disciplined for harassing another student may challenge the school policy or its application as a content-based restriction of speech — because it regulates a particular subject matter — or a viewpoint-based restriction, because it establishes an acceptable view of racial or gender equality.<sup>25</sup> Normally courts subject such a restriction on speech to strict scrutiny, which requires the government to show (1) a compelling interest or purpose served by the restrictions, and (2) that the regulation is narrowly tailored to achieve that governmental interest or purpose.<sup>26</sup> Strict scrutiny is frequently, but not always, fatal to any restriction of speech.<sup>27</sup>

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applies to state and local government through the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. The Due Process Clause of the Fourteenth Amendment also provides procedural protection to those who are disciplined by public schools.

Because of the state action requirement, neither the First Amendment nor the Fourteenth Amendment applies to private schools; however, the values reflected in these amendments—free exchange of ideas and fairness—should be taught in private schools as well, and there is no better way to teach such values than through example.

24. See, e.g., Steven H. Shiffrin, *Racist Speech, Outsider Jurisprudence, and the Meaning of America*, 80 CORNELL L. REV. 43 (1994); Richard Delgado & Jean Stefancic, *Hateful Speech, Loving Communities: Why Our Notion of "A Just Balance" Changes so Slowly*, 82 CAL. L. REV. 851 (1994); Charles R. Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431 (1990); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).
25. A regulation of speech is content-based if it regulates discussion of a certain topic, such as racial or sexual equality. A regulation is viewpoint-based if it prohibits dissemination of anti-equality sentiments while allowing pro-equality expression. The latter type of regulation is more offensive to First Amendment principles because it represents a governmental determination of the accepted view on a particular subject.
26. See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989) (holding a Texas statute regulating flag burning unconstitutional).
27. See, e.g., *Frisby v. Schultz*, 487 U.S. 474 (1988) (stating that an ordinance prohibiting focused was picketing justified by the government's interest in protecting the well-being, tranquility and privacy of the home); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (holding that the government interest in gender equality trumps the First Amendment interest in expressive association); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (holding that the government interest in preserving the peace and protecting individuals from harm trumps the First Amendment interest in uttering "fighting words").

The governmental interest in a policy prohibiting racial and sexual harassment in public schools is to assure equal educational opportunities for all students, regardless of race or gender, and to avoid injury to students. In another context, the U.S. Supreme Court recognized in *Roberts v. United States Jaycees* that a state's interest in eradicating discrimination against females was compelling.<sup>28</sup> *Roberts* addressed a First Amendment challenge, based on the right to expressive association, to Minnesota's Human Rights Act, which prohibited sex discrimination in places of public accommodation, as applied to membership organizations such as the Jaycees. The state determined that sex discrimination by such organizations imposes barriers to female economic advancement and political and social integration.<sup>29</sup> Certainly barriers to an equal educational opportunity are as harmful as barriers to such public accommodations. Therefore, a public school should be able to survive the first prong of the strict scrutiny standard.<sup>30</sup>

A regulation restricting only speech or symbolic expression that interferes with an equal educational opportunity is the least restrictive means of accomplishing the compelling government interest identified above.<sup>31</sup> Thus, the regulation should be general, in the sense that it reach all harassment that interferes with an equal educational opportunity, so it is not subject to an argument that it is viewpoint-based and underinclusive.<sup>32</sup> At the same time, the regulation should carefully define harassment so students are on notice of what constitutes prohibited activity and the regulation avoids a vagueness attack.<sup>33</sup>

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28. See *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

29. See *id.* at 626.

30. The government's interest in preserving equality in housing is sufficiently compelling to justify the restrictions on freedom of expression found in 42 U.S.C. § 3617, which prohibits the interference with one's enjoyment of housing through such expressive activity as a cross burning in front of a home. See, e.g., *United States v. J.H.H.*, 22 F.3d 821, 826-28 (8th Cir. 1994); *United States v. Hayward*, 6 F.3d 1241, 1249-51 (7th Cir. 1993).

31. The "narrowly tailored" requirement assures that the means utilized to accomplish the compelling governmental objective regulate no more speech than is necessary to accomplish the objective. Even where there is a compelling governmental interest, a regulation will be struck down if it is not narrowly tailored. See, e.g., *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105 (1991).

32. See *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

33. "A law is unconstitutionally vague if a reasonable person cannot tell what speech is prohibited and what is permitted." CHEMERINSKY, *CONSTITUTIONAL LAW PRINCIPLES AND POLITICS* 763 (1997). See, e.g., *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) ("[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement").

A related concept is overbreadth. "A law is unconstitutionally overbroad if it regulates substantially more speech than the Constitution allows to be regulated and a person to whom the law constitutionally can be applied can argue that it

In defending a First Amendment attack on a regulation prohibiting harassment, schools might suggest a forum approach that takes into account the role of government as an educator.<sup>34</sup> As a general matter, a public building does not automatically qualify as a public forum. The use of government-owned property may be restricted to preserve it for its intended purpose.<sup>35</sup> For example, while a trial is in session, limitations can be placed on speech in the courtroom; while a class is in session, limitations can be placed on speech in the classroom. If a school is a non-public forum, then reasonable restrictions on speech will be upheld as long as they are not based on viewpoint.<sup>36</sup> This approach gives greater deference to school officials and makes it much more likely that a regulation prohibiting harassment will be upheld.

While it does not prevent school officials from addressing peer harassment of students, the First Amendment must be considered carefully when preparing a regulation designed to address harassment.<sup>37</sup> Private schools, even though not bound by the First Amendment, should promote the values embodied in the First Amendment because of the importance of a free exchange of ideas in an educational setting. With careful drafting and sensitivity to the competing concerns, schools should be able to address harassment problems without violating the First Amendment.

A second constitutional issue affects public schools' approach to regulating harassment. In attempting to address peer harassment, public schools must not ignore the requirements of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.<sup>38</sup>

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would be unconstitutional as applied to others." *CHEMERINSKY*, at 764-65. See, e.g., *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981).

34. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) (upholding statute which restricted access to both the inter-school mail system and teacher mailboxes); *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (upholding an ordinance barring a demonstration near a school); see generally *Sexual Harassment Guidance*, *supra* note 4, at 12,045-46.

The role of government as an educator has been recognized by the Court. See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

35. See, e.g., *United States v. Kokinda*, 497 U.S. 720 (1990) (upholding a prohibition on the solicitation of contributions on postal premises); *Greer v. Spock*, 424 U.S. 828 (1976) (upholding regulations barring political activities on a military base).
36. *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).
37. See *Sexual Harassment Guidance*, *supra* note 4, at 12,045-46; see also *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1026-32 (9th Cir. 1998) (expressing first amendment concerns if the plaintiff's challenge to a required reading was successful); *Saxe v. State College Area School Dist.*, 77 F. Supp. 2d 621 (M.D. Pa. 1999) (holding that a school policy is not a hate-speech code, but rather a prohibition of harassment, which has never been considered to be protected under the First Amendment).
38. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution prohibits deprivations of life, liberty or property without due process. In *Goss v.*

Those students accused of harassing other students are entitled to procedural safeguards before being "convicted" of harassment. At a minimum, they should receive sufficient notice of the charges to enable them to prepare a defense and they should be given an opportunity to be heard before an impartial tribunal, just like the process available to the student accused of striking another student.<sup>39</sup> Presumably most schools already have disciplinary procedures in place and those procedures should be adequate to address charges of harassment. While peer harassment must be taken seriously, efforts to prevent it and address complaints of harassment must not ignore the constitutional rights of those accused of harassment.

#### IV. REMEDIES FOR VICTIMS

Where efforts at prevention are unsuccessful, parents and students may consider litigation and, for obvious reasons, they would prefer to litigate against schools and their officials rather than, or at least in addition to, the students engaged in harassment. Because the potential causes of action and remedies will differ depending on the type of school and nature of the harassment, this article will examine both public and private schools, as well as racial and sexual harassment within each type of school separately. Potential actions based on common law will be considered briefly in a separate section.<sup>40</sup>

##### A. Public Schools—Federal Claims

###### 1. *Racial Harassment*

There are several federal laws, starting with the Equal Protection Clause of the Fourteenth Amendment,<sup>41</sup> that prohibit race discrimination in public schools. The Supreme Court's seminal decision in *Brown v. Board of Education*<sup>42</sup> made it clear that a public school would violate the equal protection clause, as well as federal statutes,<sup>43</sup> if it excluded or subjected a student to different terms and conditions because of her race. Similarly, racial harassment directed at a stu-

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*Lopez*, 419 U.S. 565 (1975), the Court held that students suspended from public high schools for up to ten days were entitled to procedural protection against unfair suspensions. Because the students had a protected interest in educational benefits, they were entitled to notice of the charges against them and, if they denied them, an explanation of the evidence as well as an opportunity to present their side of the story.

39. See *Goss v. Lopez*, 419 U.S. 565 (1975).

40. See *infra* section IV.C.

41. Section 1 of the Fourteenth Amendment to the U.S. Constitution provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

42. *Brown v. Board of Education*, 347 U.S. 483 (1954).

43. See 42 U.S.C. §§ 1981 and 2000d (1994).



dent by a school administrator or teacher would clearly violate the law. Peer harassment based on race, although it can deprive a student of an education, is more difficult to remedy because school officials are not directly responsible for the injury. Nevertheless, school officials have a duty to assure that all students have an equal opportunity to learn, regardless of race. Thus, the question is whether public schools and their officials can be held liable when students are deprived of an equal educational opportunity by other students because of their race.

*a. Fourteenth Amendment—Equal Protection*

When a state or local government official engages in intentional,<sup>44</sup> invidious discrimination<sup>45</sup> based on race, a violation of the Equal Protection Clause of the Fourteenth Amendment occurs unless a compelling justification exists for such discrimination.<sup>46</sup> Rarely, if ever, will government have a compelling justification for invidious race discrimination.<sup>47</sup> Therefore, if plaintiffs show that public officials are responsible for intentional, invidious race discrimination, plaintiffs should win. However, even assuming that the actions of the harassing students are directed at the student victims because of their race, the crucial question is when should the schools and school officials be legally responsible and liable, absent intentional, invidious discrimination by school officials. The answer may vary depending on the circumstances.

A number of situations will help to demonstrate the issues:

(1) A school principal expressly requests or encourages a group of students to harass, threaten and intimidate another group of students, based on the race of the latter group;

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44. In *Washington v. Davis*, 426 U.S. 229 (1976), the Court held there must be proof of a discriminatory purpose in order to show a violation of the Equal Protection Clause. A year later, in *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), the Court discussed the different ways in which a discriminatory purpose could be shown.

45. The term "invidious" is used here to distinguish the discrimination discussed here from racial classifications benefitting minorities.

46. See, e.g., *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Korematsu v. United States*, 323 U.S. 214 (1944).

47. In *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984), the Court stated that "[c]lassifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns." Ironically, the strict scrutiny standard for race discrimination was first articulated by the Court in *Korematsu v. United States*, 323 U.S. 214 (1944), the case in which the Court upheld the constitutionality of the relocation of Japanese-Americans during World War II. The outcome is probably explained by the Court's deference to the military, especially in times of war, and represents a rare example of invidious race discrimination surviving strict scrutiny.

(2) School officials, in a school without a policy addressing harassment, do not actively request or encourage students to harass, threaten and intimidate other students based on race, but give the students a "license" to engage in such activity through the officials' own discriminatory actions and attitudes, which in some cases speak more clearly and loudly than express encouragement, and their failure to address or take seriously complaints of such activity;

(3) School officials, in a school with a policy addressing harassment, while not engaged in discriminatory actions affirmatively, fail to take complaints of harassment seriously and routinely fail to investigate such complaints or, even worse, find a reason to discipline the victims, but not the perpetrators; and

(4) School officials, pursuant to a policy prohibiting peer harassment and establishing a procedure for submitting complaints, promptly investigate the complaints, make findings and then take appropriate disciplinary action against the perpetrators found in violation of the policy and also attempt to remedy the situation for the victim(s).<sup>48</sup>

Obviously the school, along with its officials, is most likely to be held liable in the first situation and least likely to be held liable in the fourth situation. The liability of the school and its principal in the first example should be no different than if the principal himself had engaged in the racially motivated harassment. As a general matter, a government official cannot avoid liability for illegal discrimination by having someone else carry out the discriminatory activity.<sup>49</sup>

The three remaining examples present more difficult situations because the causal connection between the injury to the victims and the school officials is less obvious. In the second example, school officials are aware from the complaints that the victims of harassment are be-

48. In addition to dealing with the perpetrators and ending the harassment, administrative remedies might include counseling for the victims and compensatory education.

49. Where there is "joint participation" between government officials and private persons, both can be held liable under constitutional and statutory provisions requiring action under color of law. See, e.g., *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *Sullivan v. Barnett*, 139 F.3d 158, 168-70 (3d Cir. 1998); *Davila-Lopes v. Zapata*, 111 F.3d 192, 193 (1st Cir. 1997); *Catanzano v. Wing*, 103 F.3d 223, 228-29 (2d Cir. 1996); *Leeks v. Cunningham*, 997 F.2d 1330, 1333 n.3 (11th Cir. 1993); *Phelps v. Dunn*, 965 F.2d 93, 102 (6th Cir. 1992); *Apostol v. Landau*, 957 F.2d 339, 343 (7th Cir. 1992).

Supervisors can be held liable for the actions of subordinates when there is an affirmative link between the challenged conduct and the action or inaction of the supervisor. See, e.g., *Oona, R.-S.* by *Kate S. v. McCaffrey*, 143 F.3d at 477; *Spencer v. Doe*, 139 F.3d 107, 112 (2d Cir. 1998); *Springdale Educ. Ass'n v. Springdale Sch. Dist.*, 133 F.3d 649, 653 (8th Cir. 1998); *Kaul v. Stephan*, 83 F.3d 1208, 1213 n.3 (10th Cir. 1996); *John Doe v. Hillsboro Indep. Sch. Dist.*, 81 F.3d 1395, 1402-03 (5th Cir. 1996).



ing deprived of equal educational opportunities because of their race, but they allow the deprivation to continue. Such officials, through both their encouragement and their inaction, have engaged in intentional discrimination based on race by depriving the victims of equal educational opportunities. A clear causal connection exists between the action/inaction of the school officials and the injury to the victims. Here the school officials' conduct constitutes the equivalent of that of law enforcement officials who, upon observing an African-American being beaten, decide to walk away without intervening because of the victim's race, thus depriving the victim of equal protection of the law enforcement agency.<sup>50</sup> Also, it resembles the employer that does nothing after learning that, for example, a customer of the employer is harassing one of its employees.<sup>51</sup>

The third example closely resembles the second, except the school has a formal policy. However, because school officials ignore the formal policy in practice, the situation differs little from the second. The same evil occurs: school officials are aware that students are being deprived of an equal educational opportunity because of race, but do nothing about it. Instead, they continue to operate a system that deprives students of equal opportunities because of their race. Such systemic, intentional race discrimination violates equal protection.<sup>52</sup>

In the fourth example, any liability imposed on the school or the school officials may appear to be in the nature of strict liability because there is no obvious indication of fault or causation. Here the argument against liability is strongest because the school adopted a policy prohibiting harassment and, as soon as school officials were

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50. Law enforcement officers have an affirmative duty to intervene to protect the constitutional rights of citizens from infringement by other officers. *See, e.g., Ricci v. NYC Transit Authority*, 124 F.3d 123, 129 (2d Cir. 1997); *Turner v. Scott*, 119 F.3d 425, 429-30 (6th Cir. 1997); *Frazell v. Flanigan*, 102 F.3d 877, 885-86 (7th Cir. 1996); *Mick v. Brewer*, 76 F.3d 1127, 1136 (10th Cir. 1996); *Hale v. Townley*, 45 F.3d 914, 919 (5th Cir. 1995); *Yang v. Hardin*, 37 F.3d 282, 285 (7th Cir. 1994); *United States v. Koon*, 34 F.3d 1416, 1446-49 (9th Cir. 1994) *rev'd on other grounds*, 116 S. Ct. 2035 (1996).

51. *See, e.g., Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1072-75 (10th Cir. 1998); *Rodriguez-Hernandez v. Miranda-Velez*, 132 F.3d 848, 854-55 (1st Cir. 1998); *Crist v. Focus Homes, Inc.*, 122 F.3d 1107, 1111-12 (8th Cir. 1997); *Folkerson v. Circus Circus Enterprises, Inc.*, 107 F.3d 754, 756 (9th Cir. 1997).

In a case alleging racial harassment by elementary school students and claiming a violation of equal protection and 42 U.S.C. § 1981, the court held that school districts and school officials may be held liable upon a showing of deliberate indifference to the harassment and such indifference can be shown from school officials' actions or inaction in light of known circumstances. However, summary judgment for the defendants was appropriate because the record did not include sufficient evidence for a reasonable jury to find deliberate indifference. *See Gant ex rel Gant v. Wallingford Bd. of Educ.*, 195 F.3d 134 (2nd Cir. 1999).

52. *See, e.g., Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189 (1973); *Green v. County Sch. Bd.*, 391 U.S. 430 (1968).

made aware of harassment, they took appropriate action to address the harassment. However, prompt corrective action does not eliminate the injury suffered by the victim. For example, assume the harassment was so traumatic that it caused serious health problems for the victim. Because schools have "a duty to provide a nondiscriminatory environment that is conducive to learning," the victim in this example may still be entitled to compensation for her injury. Similarly, if a school has a duty to protect students from harm caused by a third party, prompt corrective action will not eliminate liability for injuries.<sup>53</sup> One way to "reward" the school for adopting a policy and taking prompt corrective action would be to provide an affirmative defense if it could show that in fact all reasonable steps were taken to prevent the harassment.<sup>54</sup> If the school successfully establishes the affirmative defense, the injured victim could still seek compensation from the students who caused the harm.

Actions to enforce the Fourteenth Amendment are generally filed pursuant to a Reconstruction Era civil rights statute (42 U.S.C. § 1983),<sup>55</sup> under which both individuals and municipalities can be held liable. However, entities can be liable under section 1983 only when the challenged conduct was taken pursuant to municipal policy.<sup>56</sup> The policy does not have to be explicit.<sup>57</sup> Officials who have

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53. See *infra* notes 193 and 234-38 and accompanying text. In *Oona R.S. ex rel Kate S. v. McCaffrey*, 143 F.3d 473, 477 (9th Cir. 1998), the court held "the duty to take reasonable steps to remedy a known hostile environment created by a peer is clearly established. Parents have long had a right to expect school officials to do what they reasonably can to protect the children who are temporarily in their custody and to provide an appropriate learning atmosphere." *Id.*

54. Such a defense would be analogous to that created for employers in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). In *Burlington Indus.* the Court held:

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see FED. R. CIV. P. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff-employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

55. 42 U.S.C. § 1983 (1994).

56. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978); see generally IVAN E. BODENSTEINER & ROSALIE BERGER LEVINSON, *STATE & LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY* §§ 1:06-07 (1987) [hereinafter *CIVIL RIGHTS LIABILITY*].

57. See, e.g., *City of Canton v. Harris*, 489 U.S. 378 (1989) (stating that a municipality may be held liable for a failure to train or supervise where that failure constitutes a deliberate indifference to the rights of persons who come into contact with its employees, and there is a causal connection between the injury and the municipality's failure); see generally *CIVIL RIGHTS LIABILITY*, *supra* note 56, at § 1:07.

been delegated policymaking authority can bind the municipality by their conduct.<sup>58</sup> Thus, for example, the school official to whom the municipality delegates the responsibility for maintaining discipline and operating a school would generally be a person whose conduct is considered a "policy" for purposes of binding the school corporation.<sup>59</sup> Therefore, victims of racial harassment must make high-ranking school officials — including board members, the superintendent, the principal, or the persons identified in the school harassment policy — aware of the harassment. Such notice to school officials should be written, to reduce disputes about whether and when such officials really had notice. Even where the challenged action is not that of a policymaker, where a school corporation shows deliberate indifference to the rights of the students—by its failure to train employees, to discipline those who ignore their duties or to correct a denial of equal educational opportunity—and that indifference is the cause of the victims' injury, the school corporation can be held liable under section 1983.<sup>60</sup>

If a victim of peer harassment establishes liability under the equal protection clause and section 1983, she can obtain compensatory damages,<sup>61</sup> equitable relief,<sup>62</sup> costs, and attorney fees.<sup>63</sup> In addition, if a student proves that school officials acted in reckless disregard of her federally protected rights, the jury may award punitive damages, at

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58. See, e.g., CIVIL RIGHTS LIABILITY, *supra* note 56, at § 1:06; *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). It is important to consult state law to determine whether a particular policymaker has in fact been delegated final decisionmaking authority.

59. Identifying this school official will require a close review of state law. See, e.g., *Duda v. Franklin Park Pub. Sch. Dist.* 84, 133 F.3d 1054, 1061 (7th Cir. 1998); *Springdale Educ. Ass'n v. Springdale Sch. Dist.*, 133 F.3d 649, 652 (8th Cir. 1998); *Eugene v. Alief Indep. Sch. Dist.*, 65 F.3d 1299, 1304-05 (5th Cir. 1995); *Baxter ex rel Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 735-36 (7th Cir. 1994); *Cornfield by Lewis v. Consolidated High Sch. Dist. No. 230*, 991 F.2d 1316, 1325 (7th Cir. 1993); *Adkins v. Board of Educ.*, 982 F.2d 952, 958-59 (6th Cir. 1993); *Partee v. Metropolitan Sch. Dist.*, 954 F.2d 454, 456 (7th Cir. 1992); *Hull v. Cuyahoga Valley Bd. of Educ.*, 926 F.2d 505, 515-16 (6th Cir. 1991).

60. See *City of Canton v. Harris*, 489 U.S. 378 (1989). Several cases recognize that *Harris* applies in the school setting, but demonstrate the difficulty of proof. See, e.g., *Doe v. Hillsboro Indep. Sch. Dist.* 113 F.3d 1412, 1416 (5th Cir. 1997); *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 467 (8th Cir. 1996); *Thelma D. ex rel Delores A. v. Board of Educ.*, 934 F.2d 929, 934-35 (8th Cir. 1991).

61. See *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299 (1986); *Carey v. Phipps*, 435 U.S. 247 (1978); see generally CIVIL RIGHTS LIABILITY, *supra* note 56, at § 1:47.

62. The statute [42 U.S.C. § 1983 (1994)] specifically provides the injured party with a "suit in equity." See generally CIVIL RIGHTS LIABILITY, *supra* note 56, at § 1:53.

63. A 1976 amendment to the civil rights statutes provides that the court "may allow the prevailing party . . . a reasonable attorney's fee as a part of the cost." 42 U.S.C. § 1988 (1994). See generally CIVIL RIGHTS LIABILITY, *supra* note 56, at §§ 1:57 - 1:64.

least against the officials in their individual capacity.<sup>64</sup> While school officials can raise qualified immunity from damages as an affirmative defense,<sup>65</sup> this should fail in most cases because intentional discrimination based on race is clearly unconstitutional.

*b. Title VI of the Civil Rights Act of 1964*

This statute<sup>66</sup> generally prohibits race discrimination by recipients of federal financial assistance. Many elementary and secondary public schools, as well as many private schools, receive such assistance.<sup>67</sup> The DOE, through the OCR, has the authority and obligation to enforce Title VI in relation to educational institutions.<sup>68</sup> Victims can file discrimination complaints with the OCR<sup>69</sup> and, if it finds a violation, it can attempt conciliation<sup>70</sup> and ultimately initiate proceedings to

64. See *Smith v. Wade*, 461 U.S. 30 (1983); see generally CIVIL RIGHTS LIABILITY, *supra* note 56, at § 1:50. Generally, municipalities are not liable for punitive damages. See *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).

65. Government officials have available a qualified immunity from damages awarded against them in their individual capacity where the right relied upon by the plaintiff was not "clearly established" at the time of the challenged conduct. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); see generally CIVIL RIGHTS LIABILITY, *supra* note 56, at § 1:40-1:41.

66. 42 U.S.C. § 2000d (1994). The specific prohibition on discrimination reads as follows: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.*

67. In its "Budget Homepage," the United States Department of Education states:

The anti-poverty and civil rights laws of the 1960s and 1970s brought about a dramatic emergence of the Department's equal access mission. The passage of [Title VI, Title IX and § 504] which prohibited discrimination based on race, sex, and disability, respectively, made civil rights enforcement a fundamental and long-lasting focus of the Department of Education. In 1965, the Elementary and Secondary Education Act launched a comprehensive set of programs, including the Title I program of Federal aid to disadvantaged children to address the problems of poor urban and rural areas. And in that same year, the Higher Education Act authorized assistance for postsecondary education, including financial aid programs for needy college students.

In 1980, Congress established the Department of Education as a Cabinet level agency. Today, ED operates some 175 programs that touch on every area and level of education. The Department's elementary and secondary programs annually serve 15,000 school districts and more than 50 million students attending over 85,000 public schools and more than 26,000 private schools. Department programs also provide grant, loan, and work-study assistance to nearly 8 million postsecondary students.

*The Federal Role in Education* (visited April 7, 1999) <<http://www.ed.gov/offices/OUS/fedrole.html>>.

68. See 42 U.S.C. § 2000d-1 (1994); 34 C.F.R. § 100.1-100.13 (1999).

69. See 34 C.F.R. § 100.7(b)(1999).

70. See 34 C.F.R. § 100.7(d)(1999).



terminate the federal funds.<sup>71</sup> If a victim of discrimination considers litigation, they are not required to exhaust this administrative remedy.<sup>72</sup>

A private right of action exists to enforce Title VI in court<sup>73</sup> and the implementing regulations adopted by the DOE are entitled to deference in interpreting the statute.<sup>74</sup> At least some Supreme Court justices believe DOE regulations themselves may be enforced against public schools through section 1983.<sup>75</sup> The scope of the protection provided by Title VI is generally the same as the protection provided by the equal protection clause, requiring the plaintiff to prove intentional discrimination.<sup>76</sup> However, neutral practices with a disparate impact can be addressed if a Title VI regulation that reaches disparate impact applies.<sup>77</sup> In most situations it is not necessary to rely on disparate impact because a school's failure to protect students from racial harassment by other students is intentional. Assuming this is correct, then in most cases against public schools the relief available under Title VI will be similar to the relief available under section 1983 in an action to enforce the Equal Protection Clause of the Fourteenth Amendment. However, there are some potentially significant differences, depending on the situation.

First, the relief available under section 1983 may be better for plaintiffs because it provides for both compensatory and punitive dam-

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71. See 34 C.F.R. § 100.8 (1999).

72. See *Cannon v. University of Chicago*, 441 U.S. 677, 706-08 n.41 (1979) (stating in dicta that exhaustion of administrative remedies was not necessary under Title IX); *Neighborhood Action Coalition v. Canton*, 882 F.2d 1012, 1015 (6th Cir. 1989)(relying on *Cannon*, the court held that Title VI plaintiffs do not have to exhaust administrative remedies); *Doe v. St. Joseph's Hospital*, 788 F.2d 411, 426 (7th Cir. 1986)(stating that there is no need to exhaust administrative remedies under Title VI); see generally CIVIL RIGHTS LIABILITY, *supra* note 56, at § 8:36.

73. See *Cannon v. University of Chicago*, 441 U.S. 677 (1979); CIVIL RIGHTS LIABILITY, *supra* note 56, at § 8:32.

74. See *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1033 (9th Cir. 1998).

75. See *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 607 n.27 (1983).

76. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 284-87 & 325 (1978). While five justices agreed to this in *Bakke*, four justices suggested it may be limited to affirmative action cases. *Id.* at 325.

77. See *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 607 n. 27 (1983). For example,

recipients, in determining the types of services, financial aid, or other benefits, or facilities that will be provided under any such program . . . may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, . . . or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race. . . .

34 C.F.R. § 100.3(b)(2)(1999).

ages, while punitive damages are questionable under Title VI.<sup>78</sup> Second, it may be easier to hold the school corporation liable under Title VI because of the need to show a "policy" under section 1983.<sup>79</sup> Third, some courts limit liability for violations of Title VI to the recipient of federal financial assistance, usually an entity such as a school corporation.<sup>80</sup> Based on these rulings, individual school officials cannot be held liable under Title VI, although it is not clear why Title VI should be interpreted in such a limited manner, particularly where a school employee or official intentionally violates the prohibition against race discrimination.<sup>81</sup> Fourth, where the local school is an agency of the state, rather than an independent local entity, it may be insulated

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78. In *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 68-71 (1992), the Court confirmed the long-standing general rule that, absent clear direction to the contrary by Congress, where there is a cause of action under a federal statute the federal courts have the power to award any appropriate relief. Although the plaintiff's claim in *Franklin* was based on Title IX, the rationale applies to Title VI as well. Despite the broad language in *Franklin*, some lower courts have been reluctant to allow punitive damages in claims based on the federal funding statutes, such as Title VI. See, e.g., *Moreno v. Consolidated Rail Corp.*, 99 F.3d 782, 788-92 (6th Cir. 1996)(punitive damages not available under § 504); *Doe v. Londonderry Sch. Dist.*, 970 F. Supp. 64, 76 (D.N.H. 1997)(punitive damages are not available against municipalities, including public school districts, under Title IX); *Collier ex rel Collier v. William Penn Sch. Dist.*, 956 F. Supp. 1209, 1217 (E.D. Pa. 1997) (same). But see, e.g., *Pandazides v. Virginia Bd. of Educ.*, 13 F.3d 823, 829-32 (4th Cir. 1994)(punitive damages available under § 504); *Doe v. Oyster River Cooperative Sch. Dist.*, 992 F. Supp. 467, 482 (D.N.H. 1997)(punitive damages available to private litigants under Title IX); *Hernandez v. City of Hartford*, 959 F. Supp. 125, 133-34 (D. Conn. 1997)(punitive damages available under § 504); *Kilroy v. Husson College*, 959 F. Supp. 22, 24-25 (D. Me. 1997) (same); *DeLeo v. City of Stamford*, 919 F. Supp. 70, 72-74 (D. Conn. 1995)(same).
79. See discussion of the section 1983 "policy" requirement, *supra* notes 56-60 and accompanying text. While cases generally hold that the federal funding statutes impose liability on the recipient of the federal financial assistance, the circumstances under which a school corporation can be held liable under Title IX for the actions of its teachers are discussed in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998); see *infra* text accompanying notes 142-145.
80. See *Floyd v. Waiters*, 133 F.3d 786, 789-90 (11th Cir. 1998)(discussing Title IX, but not Title VI); *Smith v. Metropolitan Sch. Dist. Perry Township*, 128 F.3d 1014, 1018-21 (7th Cir. 1997)(same); *Buchanan v. City of Bolivar*, 99 F.3d 1352, 1356 (6th Cir. 1996); *Nelson v. Temple Univ.*, 920 F. Supp. 633, 638 (E.D. Pa. 1996); *Clay v. Board of Trustees*, 905 F. Supp. 1488, 1495 (D. Kan. 1995); *Bowers v. Baylor Univ.*, 862 F. Supp. 142, 145-46 (W.D. Tex. 1994). But see *Mennone v. Gordon*, 889 F. Supp. 53, 56 (D. Conn. 1995)(finding a cause of action under Title IX).
81. In *Smith v. Metropolitan Sch. Dist. Perry Township*, 128 F.3d 1014, 1020-21 (7th Cir. 1997), the court suggested that school officials may be liable under Title IX in their official capacity even though they cannot be held liable in their individual capacity. According to the court, official capacity liability will turn on state law because of the need to identify the public authority with administrative control over the school. However, the court also recognizes that an official capacity suit against an officer is generally considered an action against the entity. See *id.* at 1021 n.3.



from liability for damages by the Eleventh Amendment in a section 1983 action,<sup>82</sup> whereas Congress has abrogated the Eleventh Amendment in actions under Title VI.<sup>83</sup> Fifth, a potential advantage of Title VI lies in the availability of an administrative remedy through the OCR in the DOE. Aggrieved persons may submit a complaint<sup>84</sup> to the OCR, which has an obligation to conduct an investigation<sup>85</sup> and, if it finds noncompliance, seek to resolve the complaint through either informal means<sup>86</sup> or the withholding of federal funds.<sup>87</sup> As stated, exhaustion of these administrative remedies is not required before initiating litigation under Title VI.<sup>88</sup>

In 1994 the DOE issued an *Investigative Guidance* outlining "procedures and analysis that OCR staff will follow when investigating issues of racial incidents and harassment against students at educational institutions."<sup>89</sup> At least one court relied on the *Investigative Guidance*, giving it substantial deference and holding that a hostile racial educational environment created by student-student harassment is actionable under Title VI.<sup>90</sup> The *Investigative Guidance* specifically addresses a hostile environment and how it should be analyzed under Title VI:

A violation of Title VI may also be found if a recipient has created or is responsible for a racially hostile environment—i.e., harassing conduct (e.g., physical, verbal, graphic, or written) that is sufficiently severe, pervasive or persistent so as to interfere with or limit the ability of an individual to partici-

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82. Neither states nor state agencies are "persons" within the meaning of 42 U.S.C. § 1983. See *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989). The Eleventh Amendment to the United States Constitution generally precludes a federal court from awarding damages against the state treasury; however, it does not prohibit prospective injunctive relief against state officials in their official capacity. See *CIVIL RIGHTS LIABILITY*, *supra* note 56, at § 1:44. "However, damages can be awarded against state officials in their individual capacity." *Id.*

83. When passing legislation pursuant to its power conferred by section 5 of the Fourteenth Amendment, Congress has the power to abrogate Eleventh Amendment protection. See *CIVIL RIGHTS LIABILITY*, *supra* note 56, at § 1:46. Congress, in 42 U.S.C. § 2000d-7 (1994), abrogated Eleventh Amendment immunity in actions brought under Title VI and Title IX. See also *Litman v. George Mason*, 186 F.3d 544, 549-57 (4th Cir. 1999) (stating that in passing 42 U.S.C. § 2000d-7(a)(1), Congress permissibly conditioned receipt of Title IX funds on an unambiguous waiver of eleventh amendment immunity and the university, in accepting such funding, consented to suit in federal court); see generally *CIVIL RIGHTS LIABILITY*, *supra* note 56, at § 8:28; *Fuller v. Rayburn*, 161 F.3d 516, 518 (8th Cir. 1998); *Lesage v. Texas*, 158 F.3d 213, 216-19 (5th Cir. 1998), *rev'd on other grounds*, 120 S. Ct. 467 (1999).

84. See 34 C.F.R. § 100.7(b)(1999).

85. See 34 C.F.R. § 100.7(c)(1999).

86. See 34 C.F.R. § 100.7(d)(1999).

87. See 34 C.F.R. § 100.8-100.11 (1999).

88. See *supra* note 72.

89. *Racial Harassment Guidance*, *supra* note 3, at 11,448.

90. See *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1033 (9th Cir. 1998).

pate in or benefit from the services, activities or privileges provided by a recipient. A recipient has subjected an individual to different treatment on the basis of race if it has effectively caused, encouraged, accepted, tolerated or failed to correct a racially hostile environment of which it has actual or constructive notice (as discussed below).

Under this analysis, an alleged harasser need not be an agent or employee of the recipient, because *this theory of liability under Title VI is premised on a recipient's general duty to provide a nondiscriminatory educational environment.*

To establish a violation of Title VI under the hostile environment theory, OCR must find that: (1) A racially hostile environment existed; (2) the recipient had actual or constructive notice of the racially hostile environment; and (3) the recipient failed to respond adequately to redress the racially hostile environment. Whether conduct constitutes a hostile environment must be determined from the totality of the circumstances, with particular attention paid to the factors discussed below.<sup>91</sup>

The "factors discussed below" are (i) the "severe, pervasive or persistent standard," (ii) whether school officials had notice, actual or constructive, of the hostile environment, and (iii) the recipient's response after receipt of notice.<sup>92</sup>

As stated in the portion of the *Investigative Guidance* quoted above, "this theory of liability under Title VI is premised on a recipient's general duty to provide a nondiscriminatory educational environment." Once this duty is understood, then school district liability for a breach of the duty flows naturally. Such a duty is consistent with the requirements and purpose of Title VI, as well as the duty imposed on school corporations by state law.<sup>93</sup> Title VI provides that no person shall "be excluded from participation in, be denied the benefits of, or be subjected to discrimination" based on race by any program receiving federal financial assistance. In interpreting this language, the DOE states:

Racially based conduct that has such an effect and that consists of different treatment of students on the basis of race by recipients' agents or employees, acting within the scope of their official duties, violates Title VI. In addition, the existence of a racially hostile environment that is created, encouraged, accepted, tolerated or left uncorrected by a recipient also constitutes different treatment on the basis of race in violation of Title VI.<sup>94</sup>

Under this interpretation of Title VI, situations one through three<sup>95</sup> are clearly covered by Title VI. If Title VI means anything, it must reach schools that tolerate the deprivation of an equal educational opportunity based on race. Once a school has notice of a racially hostile environment, the failure to take corrective action constitutes encouragement, acceptance, and toleration of a discriminatory environment.

91. *Racial Harassment Guidance*, *supra* note 3, at 11,449 (emphasis added).

92. *Id.* at 11,449-11,450.

93. See *infra* section IV.C.

94. *Racial Harassment Guidance*, *supra* note 3, at 11,448.

95. See *supra* text accompanying note 48.

Situation four<sup>96</sup> may be covered too, if school officials were aware of the deprivation of an equal educational opportunity before receipt of a complaint, or took no affirmative steps to assure an equal educational opportunity. In other words, the *Investigative Guidance* would support school liability when racial harassment by other students deprives a student of an equal educational, even absent a complaint from the victim. As a condition of receiving federal financial assistance, a school corporation gives the DOE "an assurance that the program will be conducted . . . in compliance with all requirements imposed by or pursuant to this part."<sup>97</sup> This imposes an affirmative obligation to provide an equal opportunity.

Notice to a school can be either actual or constructive, according to the *Investigative Guidance*.<sup>98</sup> Even where someone employed by the school has actual notice of a racially hostile environment, a question may still be raised about the sufficiency of the notice. For example, does notice to a janitor, cook, coach, secretary, social worker, nurse, or teacher suffice to impose a duty to act on the school corporation? The answer should be yes, because the school corporation can impose on any of its employees a duty to report to the principal or superintendent, or some other designated official. To a student, several of the employees listed, particularly teachers, represent the school. It would therefore be reasonable for a student to assume she could report harassment to a teacher and expect corrective action. Similarly, it would be reasonable for a student to assume she could report harassment to a social worker or nurse, both of whom are professionals whose duties relate to the well-being of students.

Students may find reporting harassment difficult and embarrassing, and principals are not always the school employee most accessible to students. Therefore, to encourage reporting by students and to fully recognize the affirmative obligation of recipients of federal funds to make available an equal educational opportunity, actual notice to any school employee should reasonably be treated as actual notice to the school corporation. Of course, a school may encourage reporting to particular individuals through its policy, but a failure to report to one of the preferred individuals should not relieve the school corporation of liability.

Under the *Investigative Guidance*, constructive notice is sufficient to trigger a school's duty to take corrective action. It provides that "[a] recipient is charged with constructive notice of a hostile environment if, upon reasonably diligent inquiry in the exercise of reasonable care,

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96. See *id.*

97. 34 C.F.R. § 100.4(a)(1999).

98. See *Racial Harassment Guidance*, *supra* note 3, at 11,450. See *infra* note 191 and accompanying text regarding the need for actual notice and to whom it must be given.

it should have known of the discrimination."<sup>99</sup> This too flows naturally from the affirmative obligation of a recipient of federal financial assistance to ensure all students, regardless of race, an equal educational opportunity.

Another factor to be considered under the *Investigative Guidance* is the recipient's response. "Once a recipient has notice of a racially hostile environment, the recipient has a legal duty to take reasonable steps to eliminate it."<sup>100</sup> The appropriateness of the response will be evaluated "by examining reasonableness, timeliness, and effectiveness."<sup>101</sup> An appropriate response, according to the *Investigative Guidance*, will result in a finding of no violation.<sup>102</sup> This means the OCR, for purposes of administrative enforcement,<sup>103</sup> will not impose strict liability on the recipient of federal financial assistance, i.e., a school will not be held responsible for injury incurred before it had notice of the hostile environment and an opportunity to take corrective action. Such a rule may be reasonable where students cause the hostile environment, rather than a school employee, such as a teacher. However, where a school employee causes the hostile environment, the school should be liable for any injury incurred despite prompt corrective action, for the same reason that notice to any school employee should be sufficient. This resembles respondeat superior liability.<sup>104</sup> The "appropriate response" defense should be treated as an affirmative defense, with the burden of pleading and proof on the school corporation.<sup>105</sup>

One objection to school liability for a hostile environment is the difficulty in distinguishing between actionable harassment and "normal" or "typical" student behavior, including teasing. The *Investigative Guidance* addresses this concern, indicating that "[t]o determine whether a racially hostile environment exists, it must be determined if the racial harassment is severe, pervasive or persistent."<sup>106</sup> Referring

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99. *Racial Harassment Guidance*, *supra* note 3, at 11,450; see *infra* note 191 and accompanying text regarding the need for actual notice and to whom it must be given.

100. *Racial Harassment Guidance* *supra* note 3, at 11,450.

101. *Id.* at 11,450.

102. See *id.* at 11,451.

103. Limitations on enforcement through the administrative process, where the ultimate remedy is withholding of federal financial assistance, should not be applied to the employed judicial remedy. See *infra* text accompanying notes 145-48.

104. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 805-09 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 759-65 (1998).

105. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 763-65 (1998) (stating that an employer's exercise of reasonable care to prevent and correct promptly any sexually harassing behavior is part of the affirmative defense available in defending a Title VII sexual harassment case when no tangible employment action is taken).

106. *Racial Harassment Guidance*, *supra* note 3, at 11,449.



to these factors in the *Investigative Guidance*, the court in *Monteiro v. Tempe Union High School District* stated:

Whether a hostile educational environment exists is a question of fact, determined with reference to the totality of the circumstances, including the victim's race and age. Racial harassment creates a hostile environment if it is sufficiently severe that it would interfere with the educational program of a reasonable person of the same age and race as the victim.<sup>107</sup>

This appears to draw the line between actionable racial harassment and other "typical" student behavior in a reasonable manner. The key factual inquiry is whether the challenged activity interferes with the educational program, i.e., deprives the victim of an equal educational opportunity based on race. If yes, then it violates Title VI. Courts have to make a similar determination in sexual harassment claims under Title VII, where the courts distinguish between actionable sexual harassment and crude, boorish behavior that is inappropriate but not a violation of Title VII.<sup>108</sup>

c. 42 U.S.C. § 1981(a)

This statute provides that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . and to the full and equal benefit of all laws . . . as is enjoyed by white citizens . . ." <sup>109</sup> Section 1981 reaches both private and government discrimination.<sup>110</sup> The word "contracts" has been interpreted broadly and includes, for example, a private school's refusal to admit students because of their race.<sup>111</sup> Further, the term "make and enforce contracts" was defined in 1991 to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."<sup>112</sup> Therefore, since the 1991 amendment, section 1981 applies to racial harassment in employment, education and other contractual relationships.<sup>113</sup> Students and school officials engaged in racially harassing conduct can be sued under section 1981. Municipal entities, such as the school corporation or district, are subject to suit under section 1981, but the

107. *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1033 (9th Cir. 1998); see *infra* note 196 for a discussion of actionable sexual harassment.

108. See CIVIL RIGHTS LIABILITY, *supra* note 56, at § 5:18.

109. 42 U.S.C. § 1981(a)(1994).

110. See 42 U.S.C. § 1981(c)(1994); *Runyon v. McCrary*, 427 U.S. 160 (1976); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); see generally CIVIL RIGHTS LIABILITY, *supra* note 56, at § 3:07.

111. See *Runyon v. McCrary*, 427 U.S. 160 (1976); see generally CIVIL RIGHTS LIABILITY, *supra* note 56, at § 3:11.

112. 42 U.S.C. § 1981(b)(1994).

113. See, e.g., *Spriggs v. Diamond Auto Glass*, 165 F.3d 1015, 1017-19 (4th Cir. 1999); *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1008 (11th Cir. 1997); *Reynolds v. CSX Transp., Inc.*, 115 F.3d 860, 866-67 (11th Cir. 1997); *Dennis v. County of Fairfax*, 55 F.3d 151, 155 (4th Cir. 1995).

plaintiff must show that she was injured as the result of a "policy," either explicit or implicit.<sup>114</sup> Also, as discussed in the context of section 1983, the actions of a policymaker constitute the "policy" of a municipal entity.<sup>115</sup>

At least in public schools,<sup>116</sup> the "full and equal benefit" clause directly addresses the student deprived of an equal educational opportunity as a result of racial harassment by other students.<sup>117</sup> As discussed earlier, a student who must endure racial harassment in school does not enjoy "the full and equal benefit of all laws" because she is in an environment that interferes with her ability to learn.<sup>118</sup> While section 1981 is available to address a race-based denial of an equal educational opportunity, it does not necessarily add to the scope of coverage or relief available through section 1983 and Title VI.

## 2. Sexual Harassment

As with racial harassment, there are several federal laws, starting with the Equal Protection Clause of the Fourteenth Amendment, that prohibit sex discrimination in public schools. At least since the Supreme Court's holding in *Mississippi University for Women v. Hogan*,<sup>119</sup> it would violate the equal protection clause, as well as federal statutes, if a public school were to exclude or subject a student to different terms and conditions because of her gender. Similarly, sexual harassment directed at a student by a school administrator or teacher would violate the law. Peer harassment based on sex, although it can deprive a student of an education, is more difficult to remedy because school officials are not directly responsible for the injury. Nevertheless, school officials have a duty to assure that all students have an equal opportunity to learn, regardless of gender. Thus, the question again is whether public schools and their officials can be held liable when, because of their gender, students are deprived of an equal educational opportunity by other students.

114. See *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989); see generally CIVIL RIGHTS LIABILITY, *supra* note 56, at § 3:08; Federation of African-American Contractors v. City of Oakland, 96 F.3d 1204, 1209-16 (9th Cir. 1996); Randle v. City of Aurora, 69 F.3d 441, 446-50 (10th Cir. 1995).

115. See CIVIL RIGHTS LIABILITY, *supra* note 56, at § 1:04.

116. Some courts hold that the equal benefit clause requires state action. See, e.g., *Jones v. Poindexter*, 903 F.2d 1006, 1010 (4th Cir. 1990); *Pearson v. Duck*, 871 F.2d 579, 581 (6th Cir. 1989); *Mahone v. Waddle*, 564 F.2d 1018, 1029-30 (3d Cir. 1977).

117. Although there has been relatively little litigation under the equal benefit clause, see CIVIL RIGHTS LIABILITY, *supra* note 56, at § 3:14, the language of the statute clearly covers a denial of an equal educational opportunity. See, e.g., *Gant ex rel. Gant v. Wallingford Bd. of Educ.*, 195 F.3d 134 (2nd Cir. 1999).

118. See *supra* text accompanying notes 3-14.

119. 458 U.S. 718 (1982).



a. *Fourteenth Amendment—Section 1983*

Just as racial harassment is race discrimination, so too sexual harassment is sex discrimination.<sup>120</sup> Application of the Equal Protection Clause of the Fourteenth Amendment to sexual harassment in education is essentially the same as applying it to racial harassment in education. Although the Supreme Court applies strict scrutiny to race discrimination and intermediate scrutiny<sup>121</sup> to sex discrimination, this difference is not significant here because it is just as unlikely that a school could establish an important government interest (as required under intermediate scrutiny) to justify sexual harassment as it is that a school could establish a compelling government interest to justify racial harassment. In fact, it is inconceivable that a school would ever defend either type of case by arguing it has an interest in allowing harassment that interferes with an equal educational opportunity. Therefore, the issues related to using the equal protection clause to address sexual harassment are the same as when the equal protection clause is used to address racial harassment.

Some courts have erroneously held that "a § 1983 claim based on the Equal Protection Clause is subsumed by Title IX."<sup>122</sup> No evidence exists that Congress, in passing Title IX without an express private right of action, intended to eliminate a pre-existing equal protection claim based on section 1983. Courts concluding that Title IX eliminates equal protection claims based on section 1983 rely on two Supreme Court decisions, *Smith v. Robinson*<sup>123</sup> and *Middlesex County Sewerage Authority v. National Sea Clammers Association*.<sup>124</sup> *National Sea Clammers* does not apply because it deals with a different issue — whether section 1983 can be utilized to enforce substantive rights provided by a federal statute where the substantive statute itself provides a comprehensive enforcement scheme.<sup>125</sup> The analogous

120. See, e.g., *CIVIL RIGHTS LIABILITY*, *supra* note 56, at § 5:16 n.42; *David v. City and County of Denver*, 101 F.3d 1344 (10th Cir. 1996); *Nicks v. Missouri*, 67 F.3d 699 (8th Cir. 1995); *Annis v. County Westchester*, 36 F.3d 251 (2d Cir. 1994); *Beardsley v. Webb*, 30 F.3d 524 (4th Cir. 1994); *Carrero v. New York City Housing Authority*, 890 F.2d 569 (2d Cir. 1989); *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988); *Bohen v. City of East Chicago, Ind.*, 799 F.2d 1180 (7th Cir. 1986).

121. The intermediate scrutiny standard was first articulated in *Craig v. Boren*, 429 U.S. 190 (1976), and, arguably, the level of scrutiny was heightened in *United States v. Virginia*, 518 U.S. 515 (1996).

122. *Bruneau v. South Kortright Cent. Sch. Dist.*, 163 F.3d 749, 757-59 (2d Cir. 1998), *cert denied* 119 S. Ct. 2020 (1999). The Second Circuit indicates it is joining the Third and Seventh Circuits, but recognizes that the Sixth, Eighth and Tenth Circuits have held that Title IX does not eliminate section 1983 actions to enforce the Equal Protection Clause.

123. 468 U.S. 992 (1984).

124. 453 U.S. 1 (1981).

125. See *National Sea Clammers*, 453 U.S. at 19-21; see also *Wright v. City of Roanoke Redevelopment and Housing Auth.*, 479 U.S. 418, 427 (1987) (distinguishing *Na-*

issue here would be whether section 1983 can be used to enforce Title IX and *National Sea Clammers* does not control even this issue because Title IX, unlike the substantive statute at issue there, does not address private enforcement actions.<sup>126</sup>

*Smith* is closer in that it at least addresses the same issue—whether Congress can eliminate a section 1983 claim to enforce a constitutional provision by incorporating those constitutional rights into another federal statute. In *Smith*, the Court held that the Individuals with Disabilities Education Act (IDEA)<sup>127</sup> provides the exclusive means of enforcing the equal protection rights of elementary and secondary school students.<sup>128</sup> However, *Smith*, the only Supreme Court decision addressing this issue, was rendered meaningless when Congress promptly amended the IDEA and indicated it did not intend to eliminate section 1983 actions to enforce equal protection rights.<sup>129</sup> Even though Congress cannot overrule a decision of the Court, and thus *Smith* remains as precedent, it does not support the conclusion reached in some Title IX cases because Title IX, unlike the IDEA, does not provide a comprehensive enforcement scheme.<sup>130</sup> As noted earlier, it does not even provide an express right of action.

#### b. Title IX of Education Amendments of 1972

Title IX generally prohibits sex discrimination by recipients of federal financial assistance.<sup>131</sup> Most elementary and secondary public schools, and many private schools, receive such assistance. The DOE has the authority and obligation to enforce Title IX against educational institutions receiving federal financial assistance.<sup>132</sup> Victims can file discrimination complaints with the DOE OCR and, if it finds a violation, it can attempt conciliation and ultimately initiate proceedings to terminate the federal funds.<sup>133</sup> Such complaints will be ad-

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*tional Sea Clammers* as a case where the statute itself provided for private judicial remedies (thereby evidencing congressional intent to supplant the section 1983 remedy); see generally CIVIL RIGHTS LIABILITY, *supra* note 56, at § 1:20.

126. The private right of action under Title IX is implied. See *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

127. 20 U.S.C. § 1400 (1994). At the time *Smith v. Robinson*, 468 U.S. 1009 (1984), was decided, it was known as the Education for All Handicapped Children's Act.

128. See *Smith*, 468 U.S. at 1009-13.

129. See Handicapped Children's Protection Act of 1986, 20 U.S.C. § 1415(f)(1994).

130. See 20 U.S.C. § 1415 (1994).

131. The prohibition on sex discrimination reads as follows: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except . . ." 20 U.S.C. § 1681(a)(1994).

132. See 20 U.S.C. § 1682 (1994); 34 C.F.R. § 106.1 (1999).

133. See 34 C.F.R. § 106.71 (1999), which adopts the enforcement provisions related to Title VI, 34 C.F.R. §§ 100.6-100.11 and 34 C.F.R. § 101.

addressed in accordance with the DOE *Sexual Harassment Guidance* issued March 13, 1997.<sup>134</sup> If a victim of discrimination is considering litigation, exhaustion of this administrative remedy is not required.<sup>135</sup>

A private right of action exists to enforce Title IX in court<sup>136</sup> and the implementing regulations adopted by the DOE are entitled to deference in interpreting the statute.<sup>137</sup> At least some justices believe agency regulations themselves may be enforced against public schools through section 1983.<sup>138</sup> The scope of the protection provided by Title IX is generally the same as that provided by the Equal Protection Clause, although it is not clear whether plaintiffs need to prove intentional discrimination.<sup>139</sup> However, neutral practices with a disparate impact can be addressed if there is an applicable Title IX regulation that reaches disparate impact.<sup>140</sup>

Several years after determining there was an implied private right of action to enforce Title IX, the Court concluded that Title IX authorized a high school student who had been sexually harassed by a teacher to recover damages from the school district.<sup>141</sup> However, in *Gebser v. Lago Vista Independent School District*,<sup>142</sup> the Court substantially limited the circumstances in which a school corporation can be held liable for injuries caused by a teacher who sexually harassed a student, beginning in her eighth grade. In short, the *Gesber* Court held that it "will not hold a school district liable in damages under Title IX for a teacher's sexual harassment of a student absent actual

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134. *Sexual Harassment Guidance*, *supra* note 4, at 12,033.

135. See *Cannon v. University of Chicago*, 441 U.S. 677 (1979); see generally CIVIL RIGHTS LIABILITY, *supra* note 56, at § 8:36.

136. See *Cannon v. University of Chicago*, 441 U.S. 677 (1979). As with Title VI, *supra* note 80, the recipient-entity, rather than officials of the entity, may be the only appropriate defendant. See, e.g., *Soper ex rel. Soper v. Hoben*, 195 F.3d 845 (6th Cir. 1999), *Doe v. School Administrative Dist. No. 19*, 66 F. Supp. 2d 57 (D. Me. 1999), and *Niles v. Nelson*, 72 F. Supp. 2d 13 (N.D.N.Y. 1999), all suggesting there is no individual capacity liability for violations of Title IX.

137. See 20 U.S.C. § 1682 (1994); compare *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1033 (9th Cir. 1998) (referring to Title VI, *Racial Harassment Guidance*); with *Doe v. University of Ill.*, 138 F.3d 653, 667 (7th Cir. 1998) (holding that Title IX Sexual Harassment Guidance is not entitled to strict deference, but "it merits our consideration"). Each federal agency providing federal financial assistance is authorized by Congress to adopt regulations implementing Title IX. See 20 U.S.C. § 1682 (1994).

138. See *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983); CIVIL RIGHTS LIABILITY, *supra* note 56, at § 8:23.

139. See, e.g., *Roberts v. Colorado State Bd. of Agriculture*, 998 F.2d 824, 832-33 (10th Cir. 1993) (holding that intent not required to show a violation of Title IX); *Chance v. Rice Univ.*, 984 F.2d 151, 153 (5th Cir. 1993) (holding that a plaintiff could not establish a *prima facie* case of disparate impact, even if that standard should be applied to her Title IX claim).

140. See, e.g., 34 C.F.R. § 106.21-106.23 (1994).

141. See *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992).

142. 524 U.S. 274 (1998).

notice and deliberate indifference."<sup>143</sup> The "actual notice" must be to "an official of the recipient entity with authority to take corrective action to end the discrimination."<sup>144</sup>

Even though the private right of action to enforce Title IX is implied, the Court looked to the express administrative remedy found in Title IX, requiring notice to an appropriate person and an opportunity to rectify any violation, for guidance in fashioning the implied damage remedy. The Court held:

It would be unsound, we think, for a statute's *express* system of enforcement to require notice to the recipient and an opportunity to come into voluntary compliance while a judicially *implied* system of enforcement permits substantial liability without regard to the recipient's knowledge or its corrective actions upon receiving notice.<sup>145</sup>

This logic appears unsound for several reasons. First, Congress views the express administrative remedy, withholding of federal financial assistance, as more drastic than the implied judicial remedy. Congress overturned the Court's decision in *Grove City College v. Bell*<sup>146</sup> that limited coverage of the prohibition on discrimination to the specific program that receives federal funds, and expanded coverage to the entire institution based on funding received by only one program. But Congress continued to limit the administrative remedy-withholding federal funds-to the situation where the discrimination actually takes place in the program receiving the federal funds.<sup>147</sup> Thus, if a university receives federal funds in its medical school, a victim of sex discrimination in the athletic department has an implied right of action under Title IX, but the federal financial assistance to the medical school could not be terminated administratively based on the discrimination in the athletic department. The cutoff of federal financial assistance is more drastic because the intended beneficiaries of the funding are deprived of the benefits of the federal funds.<sup>148</sup> In contrast, a more narrow damage judgment punishes the university, the wrongdoer, for violating the law without affecting, at least not directly, the beneficiaries of the federal financial assistance.

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143. *Gebser*, 524 U.S. at 292-93; see *Willis v. Brown University*, 184 F.3d 20 (1st Cir. 1999); *Doe v. School Administrative Dist. No. 19*, 66 F. Supp. 2d 57 (D. Me. 1999); *Turner v. McQuarter*, 79 F. Supp. 2d 911 (N.D. Ill. 1999).

144. *Gebser*, 524 U.S. at 290.

145. *Id.* at 289-90 (emphasis in original). The "express means of enforcement" referred to by the Court is found at 20 U.S.C. § 1682 and 34 C.F.R. §§ 100.7, 100.8 and 106.3.

146. 465 U.S. 555 (1984).

147. Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687 (1994). The program specificity requirement for administrative enforcement of Title IX is found in 20 U.S.C. § 1682 (1994). See CIVIL RIGHTS LIABILITY, *supra* note 56, at § 8:14.

148. The Court recognized this in *Cannon v. University of Chicago*, 441 U.S. 677, 704-06 (1979).



Second, the Court, in interpreting a law designed to end sex discrimination in education, appears more concerned about the financial health of the offending institution than it is about compensating the victim of the illegal discrimination. This is evident from the majority's concern that "an award of damages in a particular case might well exceed a recipient's level of federal funding."<sup>149</sup> There is no basis for this concern. When an institution accepts federal funds explicitly conditioned on its agreement<sup>150</sup> to abide by the anti-discrimination provision and then proceeds to engage in discrimination that causes injuries in excess of the federal funding, the institution has breached its agreement with the federal government. It is not clear why the Court should be concerned about imposing liability beyond the amount of the federal funding. Compensatory damages are meant to make victims whole, and the amount awarded should be governed by the extent of the victim's injury, not the defendant's resources.<sup>151</sup> At least since *Cannon v. University of Chicago*<sup>152</sup> in 1979, educational institutions accepting federal financial assistance have been on notice that victims of discrimination have a private right of action. The unanimous decision in *Franklin v. Gwinnet County Public School*<sup>153</sup> in 1992, which simply confirms the 1946 holding in *Bell v. Hood*<sup>154</sup> that "all appropriate remedies" are available in court unless Congress expressly indicates otherwise, clearly placed such institutions on notice that damages were available to victims of sex discrimination. If

149. *Gebser*, 524 U.S. at 290. In contrast, the Court in *Cedar Rapids Community Sch. Dist. v. Garret F.*, 526 U.S. 66 (1999), was much less concerned with the financial burden imposed upon the recipients of federal financial assistance pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-87 (1994). There the Court recognized that the school corporations "may have legitimate financial concerns, but our role in this dispute is to interpret existing law." *Gebser*, 524 U.S. at 77.

150. A Department of Education regulation, 34 C.F.R. § 106.4(a)(1999), reads as follows:

Every application for Federal financial assistance for any education program or activity shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part. An assurance of compliance with this part shall not be satisfactory to the Assistant Secretary if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with § 106.3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior to or subsequent to the submission to the Assistant Secretary of such assurance.

151. See *Carey v. Phipps*, 435 U.S. 247, 254 (1978) (A defendant's resources may be relevant to an award of punitive damages, but not compensatory damages.); *Smith v. Wade*, 461 U.S. 30, 36 n.5 (1983).

152. 441 U.S. 677 (1979).

153. 503 U.S. 60 (1992).

154. 327 U.S. 678 (1946).

this was not apparent to schools from *Bell*, it certainly was after the 1986 amendments abrogating Eleventh Amendment immunity.<sup>155</sup>

Upon close examination, Justice O'Connor's justifications for the limited liability rule adopted in *Gebser* and discussed above are not convincing. Once these stated justifications are exposed and undermined, it is apparent that they were simply a proxy for the Court's unwillingness to give student victims of sexual harassment the benefit of the normal rules of liability, agency, and relief. As pointed out by Justice Stevens in his dissent, which was joined by three other justices, "[a]s a matter of policy, the Court ranks protection of the school district's purse above the protection of immature high school students that [agency] rules would provide."<sup>156</sup>

The decision in *Gebser* is particularly perplexing in light of the Court's decisions a few days later in two Title VII cases involving sexual harassment in employment.<sup>157</sup> There the Court was willing to impose "vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee."<sup>158</sup> Under Title VII, an affirmative defense is available to the employer when a supervisor's harassment does not culminate "in a tangible employment action, such as discharge, demotion, or undesirable reassignment."<sup>159</sup> However, where the harassment does culminate in "a tangible employment action," no affirmative defense is available to the employer.<sup>160</sup> The affirmative defense "comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise,"<sup>161</sup> and the employer bears the burden to establish the elements of the defense.

Strict liability, without an available affirmative defense, is justified where there is "a tangible employment action" because "there is an assurance the injury could not have been inflicted absent the agency relation."<sup>162</sup> This, the Court concludes, satisfies the "aided in accomplishing the tort by the existence of the agency relation" require-

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155. See 42 U.S.C. § 2000d-7 (1994).

156. See *Gebser*, 524 U.S. at 306 (Stevens, J. dissenting).

157. See *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

158. *Burlington Indus.*, 524 U.S. at 765.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 761-62.

ment of Restatement (Second) of Agency § 219(2)(d).<sup>163</sup> Such "[t]angible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates."<sup>164</sup> In contrast, harassment by nonsupervisors triggers employer liability only where the employer "was negligent or reckless,"<sup>165</sup> and an employer is "negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it."<sup>166</sup>

Justice Stevens, in his dissent in *Gebser*, argued for application of the standard found in Restatement (Second) of Agency § 219(2)(d).<sup>167</sup> "This case presents a paradigmatic example of a tort that was made possible, that was effected, and that was repeated over a prolonged period because of the powerful influence that [the teacher] had over [the student] by reason of the authority that his employer, the school district, had delegated to him."<sup>168</sup> In fact, Justice Stevens correctly noted, "[a]s a secondary school teacher, [he] exercised even greater authority and control over his students than employers and supervisors exercise over their employees."<sup>169</sup> Thus, vicarious liability should have been imposed on the school district. Because the affirmative defense issue had not been presented in *Gebser*, Justice Stevens did not address it.<sup>170</sup>

In her dissent in *Gebser*, joined by two justices, Justice Ginsburg says she, "[i]n line with the tort law doctrine of avoidable consequences, . . . would recognize as an affirmative defense to a Title IX charge of sexual harassment, an effective policy for reporting and redressing such misconduct."<sup>171</sup> To take advantage of this defense, the school district would have "to show that its internal remedies were adequately publicized and likely would have provided redress without exposing the complainant to undue risk, effort, or expense."<sup>172</sup> She concludes that a plaintiff who "unreasonably failed to avail herself of the school district's preventive and remedial measures, and consequently suffered avoidable harm, . . . would not qualify for Title IX relief."<sup>173</sup> Under the doctrine of avoidable consequences, to which Justice Ginsburg refers, a defendant does not avoid liability unless all harm was avoidable by the plaintiff. Normally that doctrine resem-

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163. RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1957); see *Burlington Indus.*, 524 U.S. at 760-65.

164. *Burlington Indus.*, 524 U.S. at 762.

165. RESTATEMENT (SECOND) OF AGENCY, § 219(2)(b) (1957).

166. *Burlington Indus.*, 524 U.S. at 759.

167. RESTATEMENT (SECOND) OF AGENCY, § 219(2)(d) (1957).

168. *Gebser*, 524 U.S. at 299 (Stevens, J. dissenting).

169. *Id.*

170. See *id.* at 304.

171. *Id.* at 307 (Ginsburg, J. dissenting).

172. *Id.*

173. *Id.*

bles a mitigation requirement and simply reduces the amount of damages and allows compensation for the harm that could not be avoided.<sup>174</sup> As an affirmative defense, it places the burden of both pleading and proving the defense on the defendant.

As demonstrated by the dissenting opinion of Justice Stevens, application of Restatement (Second) of Agency § 219(2)(d) in *Gebser* would have led to a different result.<sup>175</sup> Justice O'Connor's attempt in *Gebser* to distinguish Title VII from Title IX—based on the fact that Title VII expressly provides for damages and the Title VII prohibition against discrimination in employment runs against an "employer," which is defined to include "any agent"<sup>176</sup>—is simply not convincing. First, the fact that Title VII provides an express right of action and Title IX an implied right of action, according to *Franklin and Bell*, is not relevant when it comes to the courts' power to impose liability or provide a remedy.<sup>177</sup> Second, the Court in *Burlington Industries* and *Faragher* did not rely on the definition of "employer" in Title VII as its basis for imposing vicarious liability on employers. Rather, it applied general agency law.<sup>178</sup> The same should be true under Title IX, as recognized by the Department of Education in its *Sexual Harassment Guidance*.<sup>179</sup> Application of agency law in *Gebser*, like that reflected in Restatement (Second) of Agency § 219(2)(d), would lead to the same result reached in *Burlington Industries* and *Faragher*—the employer (school district) would have been held liable for the sexual harassment of one of its agents, the teacher, who "brings the official power of the enterprise to bear on subordinates"<sup>180</sup> (students) just like a supervisor in the employment context. Justice Stevens correctly recognized that the teacher-student sexual harassment case presents an even stronger case for employer/institution liability than the supervisor-employee sexual harassment case because a teacher has greater authority and control over his students than a supervisor over subordinates. Furthermore, the sexual abuse of the student—like the sexual abuse of an employee—"was made possible only by [the teacher's] affirmative misuse of his authority as her teacher."<sup>181</sup>

174. See *Burlington Indus., Inc.*, 524 U.S. at 764; *Lawson v. Trowbridge*, 153 F.3d 368, 376-78 (7th Cir. 1998); *Outboard Marine Corp. v. Babcock Indus., Inc.*, 106 F.3d 182, 184-85 (7th Cir. 1997); RESTATEMENT (SECOND) OF TORTS § 918 (1977).

175. See *Gebser*, 524 U.S. at 298-301.

176. *Id.* at 280-84.

177. See *Franklin v. Gwinnet County Pub. Sch.*, 503 U.S. 60, 66-71 (1992) (confirming the longstanding general rule that, absent clear direction to the contrary by Congress, where there is a cause of action under a federal statute, the federal courts have the power to award any appropriate relief).

178. *Burlington Indus., Inc.*, 524 U.S. at 760-65; *Faragher*, 524 U.S. at 801-09.

179. *Sexual Harassment Guidance*, *supra* note 4, at 12,039-40.

180. *Burlington Indus., Inc.*, 524 U.S. at 762.

181. *Gebser*, 524 U.S. at 300.



About a year after deciding *Gebser*, the Court again addressed the scope of Title IX in determining whether a school district can be held liable for harm resulting from student-student harassment in elementary or secondary schools. In another 5-4 opinion, with the four dissenters in *Gebser* joining Justice O'Connor, the Court in *Davis v. Monroe County Board of Education*,<sup>182</sup> held that the plaintiff stated a claim for relief under Title IX. The court of appeals in *Davis*<sup>183</sup> affirmed a dismissal for failure to state a claim under Title IX "because Congress gave no clear notice to schools and teachers that they, rather than society as a whole, would accept responsibility for remedying student-student sexual harassment when they chose to accept federal financial assistance under Title IX."<sup>184</sup> This holding rested on the court's conclusion that "an enactment under the Spending Clause must unambiguously disclose to would-be recipients all facts material to their decision to accept Title IX funding"<sup>185</sup> and Congress failed to provide such notice of potential liability for student-student harassment in the language or history of the statute. Assuming the Court in *Franklin* recognized a Title IX cause of action for teacher-student sexual harassment, but suggesting it was dicta, the Eleventh Circuit in *Davis* was unwilling to extend it to student-student sexual harassment.<sup>186</sup>

Dismissal of the claim in *Davis* for failure to state a claim is inconsistent with *Franklin* and *Gebser*, both of which recognized that sexual harassment is a form of sex discrimination prohibited by Title IX. In *Meritor Savings Bank v. Vinson*,<sup>187</sup> the Supreme Court's first sexual harassment case, the Court recognized that sexual harassment, like racial harassment, is a form of discrimination because it constitutes an arbitrary barrier to equality. A victim of racial or sexual harassment in the workplace is denied an equal employment opportunity because she is subjected to different terms and conditions of employment because of her race or sex.<sup>188</sup> Very simply, an employer with a racially or sexually hostile work environment says, "you can work here, but because of your race or sex you will have to tolerate abuse."

Similarly, a school district in which teachers abuse students because of their race or sex is saying "you can attend school, but because of your race or sex you will have to tolerate abuse by your teachers." There can be little doubt that such abuse, directed at certain students

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182. 119 S. Ct. 1661 (1999). The four justices who joined O'Connor in *Gebser*—Rehnquist, Scalia, Kennedy and Thomas all dissented in *Davis*.

183. *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997), cert. granted, 119 S. Ct. 29 (1998).

184. *Davis*, 120 F.3d at 1406.

185. *Id.*

186. See *id.* at 1400 n.14.

187. 477 U.S. 57 (1986).

188. See *id.* at 66.

because of their race or sex, is a form of race or sex discrimination and deprives the victims of an equal educational opportunity. It is no different than a teacher saying to a student "because of your race or sex I will not provide you with the materials supplied to the other students in this class." Would the Eleventh Circuit say in the latter situation that a student deprived of class materials by her teacher, because of her sex, does not have a Title IX claim? Of course not.

Assume that a teacher, instead of directly depriving a student of class materials because of her sex, tells a few of her male classmates to "steal" her materials after class and return them to the teacher. Presumably the same result—even in the Eleventh Circuit the victim could state a claim under Title IX. Now assume that the same teacher neither withholds the class materials from a student because of her sex, nor directs her classmates to deprive her of the materials, but instead knows the classmates are taking her materials and decides to do nothing about it.<sup>189</sup> Clearly the victim is still being deprived of an equal educational opportunity and she should have a Title IX claim against the school district. In each of these examples, if we change the act that causes a denial of equal educational opportunity from a deprivation of class materials to sexual harassment, the result should be the same. The victim is still denied an equal educational opportunity because of her sex.

The first example, where the teacher says to a student "because of your sex I will not provide you with the materials supplied to the other students in this class," is actually the *Gebser* situation if we convert the teacher's action to sexual harassment. Even Justice O'Connor would say the school district could be held liable for the action of the teacher who deprives a female student of class materials because of her sex, but only if "an official of the recipient entity with authority to take corrective action to end the discrimination"<sup>190</sup> had actual notice of the teacher's action and was deliberately indifferent to the discrimination. Thus, while *Gebser* suggests the lower court in *Davis* is wrong because sexual harassment of students is actionable under Title IX, *Gebser* creates another hurdle for the plaintiff-victim in *Davis*. Applying the *Gebser* standard for school district liability, the victim of student-student harassment will have to show that a school official "with

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189. The Court in *Davis* uses a similar example:

Consider, for example, a case in which male students physically threaten their female peers every day, successfully preventing the female students from using a particular school resource - an athletic field or a computer lab, for instance. District administrators are well aware of the daily ritual, yet they deliberately ignore requests for aid from the female students wishing to use the resource.

119 S. Ct. at 1675.

190. *Gebser*, 524 U.S. at 290.

authority to take corrective action and to end the discrimination"<sup>191</sup> had actual notice of the student-student harassment and was deliberately indifferent to the discrimination. Presumably school officials such as teachers and counselors have authority to deal with student-student harassment, just like they have authority to deal with a situation where one student assaults another, and therefore their knowledge would be sufficient to render the school corporation liable.

In *Davis*, the Court answered some of the questions relating to student-student harassment. First, it held that at least "in certain limited circumstances," a school district's "deliberate indifference to known acts of harassment . . . amounts to an intentional violation of Title IX, capable of supporting a private damages action."<sup>192</sup> Here, the Court noted that both the Title IX regulatory scheme and the common law placed schools on notice that they may be liable for their failure to respond to the discriminatory acts of third parties.<sup>193</sup> However, the Court was quick to note the limits on a school district's liability. A recipient of federal funds can be held liable only where it "exercises substantial control over both the harasser and the context in which the known harassment occurs."<sup>194</sup> Further, Justice O'Connor stressed that the deliberate indifference standard adequately protects school administrators because they "must merely respond to known peer harassment in a manner that is not clearly unreasonable."<sup>195</sup>

Second, the Court emphasized the meaning of "discrimination" and the fact that harassment is a form of discrimination. Therefore, recipients are "liable in damages [under Title IX] only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."<sup>196</sup> While physical exclu-

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191. *Id.* "Because officials' roles vary among school districts, deciding who exercises substantial control for the purposes of Title IX liability is necessarily a fact-based inquiry." *Murrell v. School Dist. No. 1*, 186 F.3d 1238, 1247 (10th Cir. 1999). Where school officials did not have knowledge of the harassment until after the fact, and promptly acted to correct the situation after learning of it, the defendants were not liable under Title IX. *Soper ex rel. Soper v. Hoben*, 195 F.3d 845, 855 (6th Cir. 1999); see also *Wills v. Brown University*, 184 F.3d 20, 25-27 (1st Cir. 1999).

192. *Davis*, 119 S. Ct. at 1671.

193. See *id.* at 1671-72.

194. *Id.* at 1672. For example, in *Davis* most of the harassment took place in the classroom.

195. *Id.* at 1674.

196. *Id.* at 1675. The Court did not specify which school officials have to have actual notice, however, the *Gebser* standard, one with "authority to take corrective action and to end the discrimination," suggests a wide range of school officials would satisfy the requirement because most officials have the authority to take corrective action against students. 524 U.S. at 290, see *supra* note 191.

sion from educational opportunities is not necessary, victim-students must show they "are effectively denied equal access to an institution's resources and opportunities."<sup>197</sup> To address the concerns of the dissenting justices, the majority was careful to point out that "simple acts of teasing and name-calling among school children" will not support private damage actions because they will be limited to "cases having a systemic effect on educational programs or activities . . ."<sup>198</sup> It is unlikely, but not impossible, that a single instance of peer harassment will be sufficiently severe to meet the standard.<sup>199</sup>

The Court in *Davis* properly viewed student-student sexual harassment as a denial of or interference with an equal educational opportunity, rather than simply "sexual harassment." Obviously, the same is true of racial harassment. School districts are on notice that Title VI and Title IX require them to provide an equal educational opportunity to all children, regardless of race or sex. Public schools have been on notice of this general obligation at least since *Brown*<sup>200</sup> (race) in 1954 and *Hogan*<sup>201</sup> (sex) in 1982. They have had more specific notice at least since DOE issued its *Investigative Guidance* regarding racial harassment<sup>202</sup> in 1994 and its guidance regarding sexual harassment<sup>203</sup> in 1997. Similarly, the assurances required by the DOE of all recipients of federal funds give clear notice that all students are entitled to an equal educational opportunity, regardless of race or gender.<sup>204</sup>

In the third example above — where the teacher neither withholds the class materials from a student because of her sex, nor directs her classmates to deprive her of the materials, but instead knows the classmates are taking her materials and decides to do nothing about it — the question is whether the school district can be held liable under

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Where the plaintiff alleged that over the course of a month a high school student repeatedly took her "to a secluded area and battered, undressed, and sexually assaulted her" the wrongdoing was "sufficiently severe, pervasive and objectively offensive" to state a claim. *Murrell v. School Dist. No. 1*, 186 F.3d 1238, 1248 (10th Cir. 1999); see *Soper ex rel. Soper v. Hoben*, 195 F.3d 845, 854-55 (6th Cir. 1999).

197. *Davis*, 119 S. Ct. at 1675.

198. *Id.* at 1675-76. In *Davis*, the drop in the victim's grades "provides necessary evidence of a potential link between her education and [the harassment]," but her ability to state a claim "depends equally on the alleged persistence and severity of [the harassment], not to mention the Board's alleged knowledge and deliberate indifference." *Id.* at 1676.

199. See *id.* at 1676. But see *Doe v. School Admin. Dist. No. 19*, 66 F. Supp. 2d 57, 62 (D. Me. 1999) ("[A] student's claim of hostile environment [under Title IX] can arise from a single incident").

200. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

201. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

202. *Racial Harassment Guidance*, *supra* note 3.

203. *Sexual Harassment Guidance*, *supra* note 4.

204. See 34 C.F.R. § 100.4 (1999)(race); 34 C.F.R. § 106.4 (1999)(sex).



Title IX for the action, or inaction, of the teacher. For several reasons, the argument for liability here is stronger than in *Gebser*. Based on the agency principles discussed in *Burlington Industries*, this example presents a good case for school district liability under Restatement (Second) of Agency § 219(1): "[a] master is subject to liability for the torts of his servants committed while acting in the scope of their employment."<sup>205</sup> As recognized by the Court in *Burlington Industries*, an employer "may be liable for both negligent and intentional torts committed by an employee within the scope of his or her employment."<sup>206</sup> While the Court was quick to conclude that, as a general rule, "sexual harassment by a supervisor is not conduct within the scope of employment,"<sup>207</sup> a teacher's failure to correct an obvious denial of an equal educational opportunity certainly falls within the scope of his employment. In fact, the core job of a teacher is to provide equal opportunities to *all* children. Elimination of the personal motive, present when a supervisor sexually harasses a subordinate or a teacher sexually harasses a student, facilitates a finding of action within the scope of employment here.

Even if it is determined that this teacher did not act within the scope of his employment, Restatement (Second) of Agency § 219(2) provides a basis for school district liability.

(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

(a) the master intended the conduct or the consequences, or

(b) the master was negligent or reckless, or

(c) the conduct violated a non-delegable duty of the master, or

(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.<sup>208</sup>

Subparts (b) through (d) may trigger school district liability in this example. In considering subpart (b) in *Burlington Industries*, the Court stated "[a]n employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it."<sup>209</sup> Similarly, a school district acts negligently with respect to a denial of an equal educational opportunity if it knew or should have known of it and failed to address it. Thus, actual knowledge is not required and since teachers have direct responsibility for the education of students, the school district has actual knowledge of the deprivation in this example. Because school districts have a nondelegable duty to provide all students with an equal educational opportunity,

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205. RESTATEMENT (SECOND) OF AGENCY § 219(1) (1957).

206. *Burlington Indus.*, 524 U.S. at 756.

207. *Id.* at 757.

208. RESTATEMENT (SECOND) OF AGENCY § 219(2) (1957).

209. *Burlington Indus.*, 524 U.S. at 759.

subpart (c) also supports school district liability where a student is deprived of such an opportunity.<sup>210</sup>

Finally, subpart (d), relied upon by the Court in *Burlington Industries*, supports vicarious liability when a teacher knows a student's classmates are taking her materials, but the teacher does nothing about it. Because a teacher has actual power to address the educational opportunity of his students, the "aided . . . by the existence of the agency relation"<sup>211</sup> prong is most relevant here. *Burlington Industries* holds that this prong requires "something more than the employment relation itself," and in that context the something more was the ability of a supervisor to take "a tangible employment action against a subordinate."<sup>212</sup> By analogy, here the something more would be the teacher's ability to take a tangible education action against the student, such as the failure to provide an equal educational opportunity. Like with the supervisor in *Burlington Industries*, the injury suffered by the student, denial of an equal educational opportunity, "could not have been inflicted absent the agency relation."<sup>213</sup> While the student here complains of inaction by the teacher, the teacher really takes an active role because he decides to proceed with his class, knowing some students do not have the required materials. The Court says a tangible employment action "in most cases in-

210. The lower court in *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390, 1399-00 n.13 (11th Cir. 1997), said there is no nondelegable duty to eliminate student-student harassment because students are not agents of the school board. This misses the point because the nondelegable duty is to provide all students with an equal educational opportunity and it is the agents of the school-superintendent, principal, teachers and others who fail in this duty. The source of the distraction is not determinative. See, e.g., *Carabba v. Anacortes Sch. Dist. No. 103*, 435 P.2d 936, 946-47 (Wash. 1967) (holding specifically that a school district was liable for the negligence of a referee who failed to notice an illegal hold on the plaintiff in a wrestling match; and generally that school districts owe a nondelegable duty to provide protection to students).

211. RESTATEMENT (SECOND) OF AGENCY § 219(2)(d).

212. *Burlington Indus.*, 524 U.S. at 2268-69; see also *Kracunas v. Iona College*, 119 F.3d 80, 87 (2nd Cir. 1997) (citing section 219(2)(d) where a college student alleged harassment by a professor, and holding that the professor acted as the school's agent in his role of professor, the school placed him in a position of authority vis a vis his students, and "his blatant abuse of that authority . . . [was] sufficient under agency principles to impute liability to [the college]"); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 900 n.21 (1st Cir. 1988) (noting in a suit by a participant in a surgical residency training program that a supervisor who sexually harasses a subordinate is almost always aided by the agency relationship). But see *Smith v. Metropolitan Sch. Dist. Perry Township*, 128 F.3d 1014, 1029-30 (7th Cir. 1997) (holding that teacher harassment of a student was not accomplished through conduct associated with the agency status and there was no evidence any school official had actual knowledge of the relationship); *Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393, 400-03 (5th Cir. 1996) (holding school district liable for harassment of a student by a teacher because management-level official knew or should have known of the teacher's misconduct).

213. *Burlington Indus.*, 524 U.S. at 761.

licts direct economic harm."<sup>214</sup> A tangible education action, such as denial of required materials, is less likely to inflict a direct economic harm but it is just as tangible and its adverse effect on the goal of school attendance (gain an education) is just as direct as the effect of harassment on the goal of employment (obtain wages).

Though the decision in *Davis* is important and a step in the right direction, the majority is unnecessarily cautious. As in *Gebser*, there is more concern for the schools and their financial condition than for the victims of harassment. Title IX, like Title VI, is so clearly about equal educational opportunity that any deprivation of such an opportunity, not corrected by school officials if they knew or should have known of it, should be actionable. Instead of imposing an affirmative obligation on school officials to assure an equal educational opportunity, *Davis* may encourage them to bury their heads in an effort to avoid "actual knowledge" of a deprivation of such an opportunity. Of course, there will be difficult proof problems in some cases and schools will have to devote resources to defending harassment claims. However, school officials have the ability to avoid liability by aggressive policies and actions designed to protect students from a deprivation of equal opportunity caused by the actions of other students.

c. *Violence Against Women Act of 1994 (VAWA)*

The VAWA<sup>215</sup> provides a cause of action for victims of a "crime of violence motivated by gender,"<sup>216</sup> where the underlying act of violence constitutes a felony under state or federal law.<sup>217</sup> Cases have held that proof of gender motivation resembles proof of sex discrimination under Title VII. To satisfy the "crime of violence" requirement, there must be "an act or series of acts that would constitute a felony against the person . . . and that would come within the meaning of State or Federal offenses described in [18 U.S.C. § 16]."<sup>218</sup> Sexual harassment may or may not involve conduct that would constitute a felony under state or federal law. Therefore, while sexual harassment is generally "motivated by gender," only the more serious type of harassment will be actionable under the VAWA. Victims of sexual harassment and abuse are beginning to assert claims under the VAWA,<sup>219</sup> usually in conjunction with other claims.

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214. *Id.* at 767.

215. 42 U.S.C. § 13981 (1994); see *Brzonkala v. Virginia Polytechnic Inst. and State Univ.*, 169 F.3d 820 (4th Cir.), cert. granted *United States v. Morrison*, 120 S. Ct. 11 (1999) (holding that the VAWA is unconstitutional because it exceeds the power of Congress under the Commerce Clause).

216. 42 U.S.C. § 13981(c)(1994).

217. See 42 U.S.C. § 13981(d)(2)(1994).

218. 42 U.S.C. § 13981(d)(2)(1994).

219. See, e.g., *Brzonkala v. Virginia Polytechnic Inst. and State Univ.*, 169 F.3d 820 (4th Cir.); *Doe v. Hartz*, 134 F.3d 1339 (8th Cir. 1998); *Ericson v. Syracuse Univ.*,

While the VAWA provides a cause of action against student perpetrators, it is not clear whether a school corporation can be held liable under the VAWA for the actions of students.<sup>220</sup> When a VAWA plaintiff establishes liability, she can recover damages, both compensatory and punitive, injunctive relief and attorney fees.

## B. Private Schools—Federal Claims

Because of the state action requirement, victims of racial and sexual harassment will not be able to seek relief based on the Equal Protection Clause of the Fourteenth Amendment and section 1983. However, the remaining federal claims discussed above do not require state action and, therefore, application of these laws to harassment in private schools generally should be the same as their application to harassment in public schools.<sup>221</sup>

## C. State Law Claims Against Schools and Student Perpetrators

There are several potential state law claims arising out of peer harassment in schools. Most state constitutions contain a provision similar to the Equal Protection Clause of the Fourteenth Amendment and some have a special provision relating to educational opportunity. Like Fourteenth Amendment claims, state constitution claims will generally be limited to public schools because of the state action requirement. Some states also have civil rights statutes that address race and sex discrimination in schools. Depending on the scope of such statutes, they may apply to harassment in elementary and secondary schools. In addition, there are a number of common law claims that may be available, depending on state law and the nature of the harassment. These include assault and battery, intentional infliction of emotional distress, tortious interference with the educational relationship, negligence/failure to protect students, and negligent hiring and/or retention.

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45 F. Supp. 2d 344 (S.D.N.Y. 1999); Liu v. Striuli, 36 F. Supp. 2d 452 (D.R.I. 1999); McCann v. Rosquist, 998 F. Supp. 1246 (D. Utah 1998); Truong v. Smith, 28 F. Supp. 2d 626 (D. Colo. 1998); Ziegler v. Ziegler, 28 F. Supp. 2d 601 (E.D. Wash. 1998); Braden v. Piggly Wiggly, 4 F. Supp. 2d 1357 (M.D. Ala. 1998); Finley v. Higbee Co., 1 F. Supp. 2d 701 (N.D. Ohio 1998); Mattison v. Click Corp. of America, 1998 WL 32597 (E.D. Pa. Jan. 27, 1998); Crisonino v. New York City Hous. Auth., 985 F. Supp. 385 (S.D.N.Y. 1997); Anisimov v. Lake, 982 F. Supp. 531 (N.D. Ill. 1997); Newton v. Coca-Cola Bottling Co. Consol., 958 F. Supp. 248 (W.D.N.C. 1997).

220. Respondeat superior liability under the VAWA is discussed, but not decided, in *Braden v. Piggly Wiggly*, 4 F. Supp. 2d 1357, 1362 (M.D. Ala. 1998).

221. In cases against private schools, 42 U.S.C. § 1983 (1994) is not available to enforce regulations adopted pursuant to Title VI or Title IX. See *supra* note 2.



### 1. *State Constitutions*

Most state constitutions have a provision similar to the Equal Protection Clause of the Fourteenth Amendment.<sup>222</sup> For example, the Indiana Constitution states: "Equal privileges - The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."<sup>223</sup> While it has rejected the U.S. Supreme Court's approach, i.e., utilizing different levels of scrutiny depending on the nature of the classification and the deprivation, in interpreting the Equal Protection Clause,<sup>224</sup> the Indiana Supreme Court has not yet demonstrated that the results will be significantly different under the "equal privileges" provision in the Indiana Constitution.

Assuming victims' rights are no greater under their state's constitutional equivalent of the federal equal protection clause, the broad remedies available under section 1983 may make the federal claim more attractive than the state claim. However, it may be easier to hold the school corporation liable under state law based on respondeat superior. Further, there may be situations where a victim wants to file an action in state court and reliance exclusively on the state constitution would preclude removal<sup>225</sup> by the defendants.

Some states have a constitutional provision that expressly addresses equality in elementary and secondary education.<sup>226</sup> Again, the Indiana Constitution provides an example:

Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly . . . to provide, by law, for a general and uniform system of Common Schools, wherein the tuition shall be without charge, and equally open to all.<sup>227</sup>

While there are few cases interpreting this section, the plain meaning of the language suggests it could be used to address a race-based or a gender-based deprivation of an equal educational opportunity.

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222. See, e.g., ARIZ. CONST. art. II, § 13; CAL. CONST. art. I, § 7; FLA. CONST. art. I, § 2; ILL. CONST. art. I, § 2; MICH. CONST. art. I, § 2; NM CONST. art. 2, § 18; NY CONST. art. I, § 11; OH CONST. art. I, § 2; SD CONST. art. 6, § 18; Tex. CONST. art. 1, § 3.

223. IND. CONST., art. I, § 23.

224. See, e.g., *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994).

225. Removal from state court to federal court is governed by 28 U.S.C. § 1441-44 (1994) and is generally limited to cases that could have been filed in federal court.

226. See, e.g., MICH. CONST., art. VIII, § 2; CAL. CONST., art. I, § 31; MONT. CONST., art. X, § 1; N.J. CONST., art. I, § 5.

227. IND. CONST., art. VII, § 1.

## 2. State Civil Rights Statutes

Many states have a civil rights statute prohibiting race and sex discrimination, however, such state laws vary widely.<sup>228</sup> Some state statutes specifically address discrimination in educational institutions.<sup>229</sup> While it is unlikely that state civil rights statutes will provide relief where the federal civil rights laws do not, in considering a claim based on harassment it is worth consulting such state laws. It is important to determine whether the relevant state law reaches discrimination or harassment in education, whether it provides for administrative enforcement, whether it provides for a private right of action, and the type of relief available.

## 3. State Tort Claims

In most jurisdictions, there are tort claims available against the students engaged in the harassment, or their parents.<sup>230</sup> In many situations, however, such claims are not worth pursuing because of the limited resources of such defendants. Where there is a chance of recovery, or the harassment continues because school officials refuse to address it, there may be reason to pursue these claims. Tort theories to be considered include assault and battery,<sup>231</sup> intentional or negli-

228. See, e.g., IND. CODE § 22-9-1-2 (1999); N.Y. CIVIL RIGHTS LAW § 40 (McKinney 1992); MICH. COMP. LAWS ANN. § 37.2102 (West 1985 & Supp. 1999); MINN. STAT. ANN. § 363.12 (West 1991 & Supp. 1999); N.J. STAT. ANN. § 10:1-3 (West 1993).

229. See, e.g., ALASKA STAT. § 14.18.010 (Michie 1999); CAL. EDUC. CODE § 200 (West 1994 & Supp. 1999); CONN. GEN. STAT. ANN. § 10-15c (West 1996 & Supp. 1998); D.C. CODE ANN. § 1-2511 (1999); FLA. STAT. ANN. § 228.2001 (West 1998); IND. CODE § 20-8.1-2-1 (1999); IOWA CODE ANN. § 216.9 (West 1994); LA. REV. STAT. ANN. § 17:1941 and § 17:111 (West 1982 & Supp. 1999); MASS. GEN. LAWS ANN. ch. 151C, § 2 (West 1996); N.Y. EDUC. LAW §§ 3201-a (McKinney 1995) and 313 (McKinney 1988 & Supp. 1999); MICH. COMP. LAWS ANN. § 37.2402 (West 1985); MONT. CODE ANN. § 49-2-307 (1999); NEB. REV. STAT. § 79-2,116 (Reissue 1999); N.J. STAT. ANN. § 18A:36-20 (West 1999); OR. REV. STAT. § 659.150 (1989 & Supp. 1998); 24 PA. STAT. ANN. tit. 24, § 5002 (West 1992 & Supp. 1999); 24 PA. STAT. ANN. tit. 24, § 20-2014-A (West 1992); R.I. GEN. LAWS § 16-38-1.1 (1999); S.D. CODIFIED LAWS § 20-13-22 (Michie 1995); TEX. EDUCATION CODE ANN. § 1.002 (West 1996); VT. STAT. ANN. tit. 16, § 1 (Supp. 1999); WASHINGTON REV. CODE ANN. § 28A.640.010 (West 1997); WIS. STAT. ANN. § 118.13 (West 1999).

230. See, e.g., CAL. CIV. CODE § 1714.1 (West 1998); IND. CODE § 34-31-4-1 (1999); 740 ILL. COMP. STAT. § 115/3 & 115/5 (West 1998); N.Y. GEN. OBLIG. LAW § 3-112 (McKinney 1989 & Supp. 1999); OHIO REV. CODE ANN. § 3109.10 (West 1995 & Supp. 1999); TEX. FAM. CODE ANN. § 41.001-002 (West 1996); TEX. FAM. CODE ANN. § 41.003 (West 1996 & Supp. 2000); WASH. REV. CODE ANN. § 4.24.190 (West 1988 & Supp. 2000); W.VA. CODE § 55-7A-2 (1994 & Supp. 1999).

231. See RESTATEMENT (SECOND) OF TORTS §§ 13, 18, and 21 (1965); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 39-42 & 43-46 (5th ed. 1984); see, e.g., *Archer v. EEOC*, 30 F. Supp. 2d 600 (E.D.N.Y. 1998); *Kelley v. Worley*, 29 F. Supp. 2d 1304 (M.D. Ala. 1998); *Grozdanich v. Leisure Hills Health Ctr., Inc.*, 25 F. Supp. 2d 953 (D. Minn. 1998); *Davis v. Palmer Dodge West, Inc.*, 977 F.

gent infliction of emotional distress,<sup>232</sup> and tortious interference with the educational relationship, which is in the nature of a contract between the school and student.<sup>233</sup> Claims against the school corporation are more likely to result in a recovery of damages, but establishing liability is more difficult. Aside from a duty to provide an equal educational opportunity, schools have a duty to supervise and protect students.<sup>234</sup> This duty arises from the special relationship between a school and its students.

While there is no general duty "to control the conduct of a third person as to prevent him from causing physical harm to another," there is such a duty when a "special relation exists."<sup>235</sup> Courts have relied on this and related sections of the Restatement in holding that school corporations may be liable for injuries to students caused by the conduct of other students.<sup>236</sup> Another section of the Restatement, imposing a duty on one with "custody of another under circumstances such as to deprive the other of his normal power of self-protection" to control the conduct of third persons,<sup>237</sup> can be applied to student-student harassment because a student while in school is deprived of the protection of her parents or guardian.<sup>238</sup>

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Supp. 917 (S.D. Ind. 1997); *Barnard v. City of Chicago Heights*, 692 N.E.2d 733 (Ill. App. Ct. 1998).

232. See RESTATEMENT (SECOND) OF TORTS § 46 (1965); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 54-66 & 359-65 (5th ed. 1984); *Hartsell v. Duplex Products, Inc.*, 123 F.3d 766 (4th Cir. 1997).
233. See RESTATEMENT (SECOND) OF TORTS § 766 (1965); see also *Bochnowski v. Peoples Fed. Sav. and Loan Ass'n*, 571 N.E.2d 282 (Ind. 1991) (regarding interference with employment relationship).
234. See generally RESTATEMENT (SECOND) OF TORTS §§ 314, 315, 320 (1965); see also *Doe v. School Admin. Dist. No. 19*, 66 F. Supp. 2d 57, 68 (D. Me. 1999) (holding that school owed a duty to the plaintiff to investigate claims of sexual misconduct).
235. RESTATEMENT (SECOND) OF TORTS § 315 (1965).
236. See, e.g., *Garcia v. City of New York*, 646 N.Y.S.2d 508 (N.Y. Sup. Ct. 1996); *Todd M. v. Richard L.*, 696 A.2d 1063 (Conn. Sup. Ct. 1995); *Turner v. Central Local Sch. Dist.*, \_\_\_ N.E.2d \_\_\_, 1995 WL 442498 (Ohio Ct. App., July 27, 1995); *Mirand v. City of New York*, 598 N.Y.S.2d 464 (N.Y. Sup. Ct. 1993); *Logan v. City of New York*, 543 N.Y.S.2d 661 (N.Y. Sup. Ct. 1989); *Leger v. Stockton Unified Sch. Dist.*, 202 Cal. App. 3d 1448 (1988); *Comuntzis v. Pinellas County Sch. Bd.*, 508 So. 2d 750 (Fla. Dist. Ct. App. 1987); *District of Columbia v. Doe*, 524 A.2d 30 (D.C. 1987); *Rodriguez v. Inglewood Unified Sch. Dist.*, 186 Cal. App. 3d 707 (1986); *Fazzolari v. Portland Sch. Dist. No. 1J*, 717 P.2d 1210 (Or. Ct. App. 1986); *School City of Gary v. Claudio*, 413 N.E.2d 628 (Ind. Ct. App. 1980); *McLeod v. Grant County Sch. Dist. No. 128*, 255 P.2d 360 (Wash. 1953).
237. See RESTATEMENT (SECOND) OF TORTS § 320 (1965). The Court in *Davis* cited this as an indication of the common law placing "schools on notice that they may be held responsible under state law for their failure to protect students from the tortious acts of third parties." 119 S. Ct. at 1671-72.
238. See generally W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 33 & 56 (5th ed., 1984).

Therefore, while it is necessary to consult the law of the relevant jurisdiction,<sup>239</sup> state tort law is a possible source of a claim against a school corporation where a student has been harassed by another student. Where state tort claims are available, they can be combined with federal claims, either in state court or in federal court based on supplemental jurisdiction.<sup>240</sup>

## V. CONCLUSION

When student-student racial or sexual harassment is properly viewed as interference with the victims' right to equal educational opportunities, then it is more likely to be viewed as a serious matter that cannot be brushed aside as normal teasing. Similarly, when such harassment is viewed in this manner, the applicability of constitutional and statutory provisions prohibiting race and sex discrimination becomes more apparent. The prospect of liability will cause school officials to take more seriously their duty to take all reasonable steps to prevent harassment and, when it occurs despite their best efforts, to respond promptly with appropriate corrective/remedial efforts. Race and sex discrimination in elementary and secondary education, even when it takes the form of harassment by fellow students, cannot be tolerated. Courts can help address the problem by showing more concern for the victims and less concern for the financial condition of school corporations that tolerate harassment and the resulting deprivation of an equal educational opportunity.

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239. See Allan E. Korpela, Annotation, *Tort Liability of Public Schools and Institutions of Higher Learning for Injuries Caused by Acts of Fellow Students*, 36 A.L.R.3d 330 (1971 & Supp. 1999).

240. See 28 U.S.C. § 1367 (codifying common law doctrine of pendent jurisdiction).